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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1723

John L. Hill, Attorney General of Texas,
Appellant,

v.

Michael L. Stone, et al.,
Appellees

On appeal from the United States District Court for the Northern Distirect of Texas

Jurisdictional Statement

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May, 1974

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IN THE

SUPREME COURT OF THE UNITED STATES
STATES

No. _____

John L. Hill, Attorney General of Texas
Appellant,

v.

Michael L. Stone, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

Jurisdictional Statement

Appellant appeals from the judgment of the United States District Court for the Northern District of Texas, Fort Worth Division, entered on March 25, 1974, granting a permanent injunction against appellant, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

THE OPINIONS BELOW

The opinion of the three-judge federal court sitting as the District Court for the Northern District of Texas, Fort Worth Division, is unreported as of this date. Copies of the judgment and the memorandum opinion are attached hereto as Appendix A.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) This suit was brought before a three-judge federal court under 28 U.S.C. §§ 2281 and 2284, as a class action pursuant to F.R. Civ. P. 23. By this suit, appellees sought to enjoin appellant from applying certain Texas constitutional and statutory election laws, as well as certain provisions of the Charter of the City of Fort Worth, Texas, which qualify the right to vote in general obligation tax bond elections upon the rendering of real, personal, or mixed property for taxation, as being in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

(ii) The judgment sought to be reviewed is the ruling of the District Court granting a permanent injunction against appellant. That judgment was entered on March 25, 1974. The Notice of Appeal was filed in the District Court for the Northern District of Texas, Fort

Worth Division, on April 18, 1974 and is attached hereto as Appendix B.

(iii) The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101 (b).

(iv) The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

> *Salyer Land Co. v. Tulare Lake Basin Water Storage District,* 410 U.S. 719 (1973);
> *City of Phoenix v. Kolodziejski,* 399 U.S. 204 (1970);
> *Cipriano v. City of Houma,* 395 U.S. 701 (1969).

(v) The validity of Tex. Const. Art. VI, Sections 3 and 3a, Tex. Election Code Ann. Art. 5.03 (Supp. 1973), Tex. Election Code Ann. Art. 5.04(a) (Supp. 1973), Tex. Election Code Ann. Art. 5.07 (1967), and the Charter of the City of Fort Worth, Ch. 25, Section 19, are here involved. The full text of these laws are set forth in Appendix C hereto.

QUESTION PRESENTED BY THE APPEAL

The following question is presented by this appeal:

> Are Texas election laws limiting the franchise in general obligation tax bond elections to persons who own taxable property which has been rendered for taxation consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

STATEMENT OF THE FACTS OF THE CASE

Article VI, Section 3a, of the Texas Constitution provides that voters voting on bond issues which will be paid in whole or in part from tax revenues must be "only qualified electors who own taxable property in the . . . political subdivision . . . where such election is held, and who have duly rendered the same for taxation, . . . " In 1969, when it first became apparent from the decisions of this Court in *Cipriano v. Houma,* 395 U.S. 701, 89 S. Ct. 1897, 23 L. Ed. 2d 647 (1969), and *Kramer v. Union Free School District No. 15,* 395 U.S. 621, 89 S. Ct. 1886, 23 L.Ed. 2d 583 (1969), that the above and related provisions of the Texas Constitution and Statutes might be incompatible with the United States Constitution, the Texas Attorney General's Office, and the bond industry and their attorneys, devised a dual-box election procedure whereby at each tax bond election two separate ballot boxes are provided. In one box only resident qualified electors who own taxable property and who have duly rendered the same for taxation are allowed to vote, and in the other box, all other resident qualified electors (who are otherwise qualified, but do not own taxable property which has been duly rendered for taxation) are allowed to vote. The votes cast in each box are recorded separately, and the returns are canvassed in such manner as reflects separately the votes cast by the two respective groups of electors.

Bonds have only been approved by the Texas Attorney General if a majority of the property owners who

have rendered their property approved, and if additionally, a majority of all voters approved. This procedure assured that bonds issued were compatible with both the Texas Constitution and the United States Constitution. The dual-box election procedure was followed in the general obligation tax bond election made the subject of this case.

On April 11, 1972, the City of Fort Worth held a tax bond election to seek authorization to issue bonds to build a library system. The ordinance authorizing the election stated that the election was to ". . . be held and conducted, in effect, as two separate but simultaneous elections, to-wit: one election at which only the resident, qualified electors who own taxable property in the City and who have duly rendered the same for taxation shall be entitled to vote on said propositions, and another election at which all other resident, qualified electors of the City shall be entitled to vote on said propositions. The votes cast at each of said separate but simultaneous elections shall be recorded, returned, and canvassed separately."

The result of the election was as follows:

Owners of Property Rendered for Taxation

FOR	**10,849**
AGAINST	**12,234**

Non-Renderers

FOR	**3,758**
AGAINST	**1,132**

TOTAL FOR:	**14,607**
TOTAL AGAINST:	**13,366**

On April 17, 1972, the City Council approved and adopted the election and, thereafter, acting pursuant to the Texas election laws, refused to sell the library bonds. On that same day, the appellees filed a class action pursuant to F.R. Civ. P. 23 requesting that a three-judge district court be convened under the authority of 28 U.S.C. Sections 2281 and 2284.

John L. Hill, Attorney General of Texas, was joined as defendant because Texas law requires that said official certify the legal validity of the proposed municipal bond issue. Tex. Rev. Civ. Stat. Ann. Art. 709d (Supp. 1973). After the bonds have been approved by the Attorney General, Texas statutes provide that they are incontestable except for fraud and unconstitutionality.

Appellees requested the District Court to declare the Texas election laws involved to be in irreconcilable conflict with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Appellees further requested the District Court to enjoin

appellants from giving any force or effect to the Texas election laws in controversy as they might relate to the outcome of the bond election held on April 11, 1972, or any other such elections thereafter held.

The case was submitted to the District Court on stipulated facts as they appeared in pages 19 through 43 of the District Court's Pre-Trial Order entered on November 8, 1972 and said factual stipulations are attached hereto as Appendix D.

On March 25, 1974, the three-judge court entered a judgment and opinion (Appendix A) declaring the questioned Texas election laws to be in violation of the Fourteenth Amendment to the United States Constitution and enjoined appellants from giving any force or effect to said laws. The District Court stayed its judgment for ten days to enable the parties to submit an application for stay to the Circuit Justice, the Supreme Court, or a Justice thereof.

On the 2nd day of April 1974, appellant filed a Motion to Modify Judgment and/or for Partial Stay in the District Court requesting a modification of the judgment to provide that the Texas dual-box election procedure in bond elections be continued pending the final outcome of this cause before the Supreme Court. The District Court entered an order on April 9, 1974, denying the appellant's Motion. The District Court granted an additional five day stay of their judgment to enable

the parties to submit an application for stay to the Circuit Justice, the Supreme Court, or a Justice thereof.

Appellant field an application for a partial stay of the District Court's judgment with the Circuit Justice, Mr. Justice Powell, on April 15, 1974. The Circuit Justice requested a reply to appellant's application from appellees. Upon receipt of the reply, the Circuit Justice granted a partial stay of the District Court's judgment by order entered on April 25, 1974.

THE QUESTION PRESENTED IS SUBSTANTIAL

The issue involved in this appeal is of great importance to the State of Texas and the political subdivisions thereof, as well as more than one-fourth of all the states which in one manner or another qualify the right to vote in general obligation bond elections on the basis of property ownership or taxation. The importance of the issue is accentuated by its potential effect on the financing which is vital to the function of the states and their subdivisions in erecting and maintaining needed public improvements. In making a final determination of the issue involved in this appeal, this Court will unquestionably and substantially affect the functions of local government as well as the continued viability of reasonable state voting qualifications in this area.

The United States Supreme Court has been presented over the last decade with numerous controver-

sies concerning the qualifications which various states have placed upon the exercise of the franchise in state and local elections. Although each of the decisions of this Court have been concerned with the particular type of election at hand and its circumstances, those same decisions have been applied generally in virtually every area of election law by this Court as well as the various lower courts, state and federal.

As a general proposition, the states have ". . . broad powers to determine the conditions under which the right of suffrage may be exercised." *Lassiter v. Northampton Election Board*, 360 U.S. 45, 50 (1959). This Court in *Lassiter* determined that voter qualification requirements may be sustained either when they promote intelligent or responsible voting (voting competence) or when they perform either of these functions in a decision upholding North Carolina's literacy requirement. This Court also cited as constitutionally permissible qualifications based on age, residence, and previous criminal record.

In keeping with the principle of *Lassiter*, this Court has condemned voter qualifications which bear no demonstrable relation to the promotion of intelligence and responsibility in voting. *Carrington v. Rash*, 380 U.S. 89 (1965) (military personnel); and *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (poll tax).

An equally important basic premise stressed by this Court is that the issues in any election should be de-

cided by a majority of the people concerned with the outcome. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963); and *Baker v. Carr*, 360 U.S. 186 (1962). However, ". . . once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper*, supra.

In 1969 and 1970, this Court rendered several decisions holding invalid state laws which selectively granted the right to vote on grounds that they denied equal protection under the Fourteenth Amendment. The first of these decisions was *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969). In *Kramer*, this Court struck down a New York statute which granted the right to vote in a local school board election only to those who owned or leased taxable real property in the district or were parents or custodians of children enrolled in the public schools. On the same day this Court decided *Kramer*, it also handed down *Cipriano v. City of Houma*, 395 U.S. 701 (1969). The *Cipriano* decision invalidated a Louisiana statute which permitted only property owners to vote on the question of approving bonds that were to be financed exclusively from the revenues of a municipal public utility. The third important decision was *Phoenix v. Kolodziejski*, 399 U.S. 204 (1970), in which an Arizona constitutional limitation of the franchise in general obligation bond elections to persons who are qualified electors and also real property taxpayers, was held to be in violation of the Equal Protection Clause.

The decisions of this Court in *Cipriano* and *Kramer* were carefully reviewed by appellant, Texas Attorney General, with respect to their application to the Texas election laws governing general obligation tax bond elections. No changes in Texas voter qualifications were deemed necessary in light of those decisions because this Court's opinions were not inclusive of the facts or the law surrounding Texas tax bond elections. However, in order to protect the outstanding public securities of this State and to insure that any subsequently voted securities would not be subject to attack based upon a controlling, unfavorable decision of the *Phoenix* case, which was at that time pending in this Court, it was decided that tax bond propositions should be covered by a dual-box election.

The result of this dual-box election policy was to require that issuers of tax bonds be required to meet all the voter qualification tests of the Texas Constitution and statutes, and in addition thereto, be required to submit tax bond propositions to the balance of the otherwise qualified electorate. Before approval would be given in the form of the Attorney General's opinion as to the validity of securities, any and all underlying propositions must have been approved not only by the owners of taxable property duly rendered, voting in a separate box, but also by the aggregate of all electors.

This policy was viewed originally as a temporary measure, on the assumption that the final determination of the *Phoenix* case would put the question to rest.

However, that decision did not settle the issue in Texas tax bond elections.

The precedents of *Kramer*, *Cipriano* and *Phoenix* constitute the framework for the District Court's judgment that the Texas constitutional and statutory qualifications for the exercise of the franchise in a general obligation tax bond election are in violation of the Fourteenth Amendment. The basic test announced in those cases and ostensibly applied by the District Court in this case requires that the Court determine whether the voter exclusions are ". . . necessary to promote a compelling state interest." *Kramer*, at 627.

There are significant differences between the three cases cited above and the provisions of the Texas election laws relevant to this case. In *Cipriano*, this Court held that ownership of property, as a restriction, is irrelevant to an election for the approval of bonds that would be financed by revenues of a public utility, thereby substantially and directly affecting property owners and non-property owners alike. The present case does not concern revenue bonds. Both *Kramer* and *Phoenix* basically involved voting restrictions based on *real* property taxation under circumstances which indicated that such a classification excluded many persons significantly affected by way of both burden and benefit. Pointedly, this Court in *Phoenix* limited its review to this question: "Does the Federal Constitution permit a State to restrict to real property taxpayers the

vote in elections to approve the issuance of general obligation bonds?" The Texas law does not restrict voting rights to owners of real property. Indeed, under Tex. Rev. Civ. Stat. Ann. Art. 7145 (1960), "All property, real, personal or mixed, except such as may be hereinafter expressly exempted, is subject to taxation and the same shall be rendered and listed as herein prescribed."

Stewart v. Parish School Board of Parish of St. Charles, 310 F. Supp. 1172 (E.D. La. 1970), aff'd mem., 400 U.S. 884, 27 L. Ed. 2d 129, 91 S. Ct. 136, is another case in the progression which needs discussion. The United States District Court for the Eastern District of Louisiana struck down Louisiana statutes which restricted eligibility to vote in tax bond elections to property taxpayers and also weighted each elector's vote by the monetary value of his assessed property. The District Court said that the affluence of the voter was not such a compelling state interest as to justify the denial of the vote to some and the dilution of the votes of the majority. Texas has no such problem. It is immaterial to the right to vote in a bond election whether one's ownership of property be great or small. *DuBose v. Ainsworth*, 139 S.W. 2d 307 (Tex. Civ. App. 1940, writ dis.). Also, in *Stewart*, the District Court noted in footnote three (page 1173) that under Louisiana law the term "property taxpayer" equates with the term "real property taxpayer" or "landowner". Texas makes no such distinction and, to the contrary, generates a substantial amount of tax revenues from personal property as evi-

denced in the attached Pre-Trial Order (Appendix D, Stip. #24A).

In *Montgomery Independent School District v. Martin*, 464 S.W. 2d 638 (Tex. 1971), the Texas Supreme Court faced the precise issue of this case. After consideration of the *Kramer, Cipriano, Phoenix* and *Stewart* cases, the Court determined that,

> "Unlike those restrictive voting laws which have been declared unconstitutionally narrow and limited, the laws in Texas have consistently granted the right to vote in general obligation bond elections to all who own personal property as well as to those who own real property. Texas Public Utilities Corporation v. Holland, 123 S.W. 2d 1028 (Tex. Civ. App. 1939, writ dis.). In Handy v. Holman, 281 S.W. 2d 356 (Tex. Civ. App. 1955, no writ), the right to vote of forty resident citizens was challenged because immediately before participating in a bond election, they had each rendered personal property valued at $100 for the very purpose of voting in a bond election. The court upheld their right to vote and also said that electors should not be 'parsed' out of their constitutional right to vote by reason of any shortcoming in compliance with statutory requirements concerning the proper and timely rendition of personal property.
>
> It is the contention of the Attorney General, and we agree, that voter qualifications of ownership under the Texas constitutional and statutory provisions stated above, as interpreted by our decisions, are so universal as to constitute no impediment to any elector who really desires to vote in a bond election. A voter is qualified if he renders any kind of property of any value, and he need not have actually paid the tax.

The quoted provisions of the Constitution and the Education Code requiring the property owner to duly render his property for taxation have been often construed by the Texas courts in connection with voting rights. Property is 'duly rendered' within the meaning of the Texas Constitution if the property is placed on the tax rolls by the tax assessor instead of by the property owner. Texas Public Utilities Corporation v. Holland, supra, or by some other person such as a husband, partner, agent or co-tenant and even though the owner's name may not appear on the tax rolls; Markowsky v. Newman, 134 Tex. 440, 136 S.W. 2d 808 (1940); Royalty v. Nicholson, 411 S.W. 2d 565 (Tex. Civ. App. 1967, writ ref. n.r.e.); Lucchese v. Mauermann, 195 S.W. 2d 422 (Tex. Civ. App. 1946, writ ref. n.r.e.), cert. denied, 329 U.S. 812, 91 L.Ed. 693, 67 S. Ct. 633 (1947); Richter v. Martin, 342 S.W. 2d 342 (Tex. Civ. App. 1961, no writ); Campbell v. Wright, 95 S.W. 2d 149 (Tex. Civ. App. 1936, no writ); or when one makes his rendition out of time and for the very purpose of qualifying as a voter. Markowsky v. Newman, supra; Handy v. Holman, 281 S.W. 2d 356 (Tex. Civ. App. 1955, no writ).

It thus appears that those who own anything can vote in a bond election if they render their property; and they are deemed by the decisions of Texas to have rendered their property if they get their property on the rolls in any manner in advance of the election. In our opinion, the requirement that the voter in a general obligation bond election must get his property on the rolls is in the interest of sound government and affords equal treatment of all citizens. One who is willing to vote for and impose a tax on the property of another should be willing to assume his distributive share of the burden. This is the manner in which the Texas Constitution, as approved by the entire citizenry of the state, provides inducement for those who wish to participate

inthe decision making process in a School District to assume their rightful portion of the burden they help to create."

***

"To disclose one's share of the total burden for which he is responsible in a bond election requires no more than the law universally expects. To allow some property owners to vote in that kind of an election, and at the same time to permit them to avoid their fair share of the resulting obligation, would confer preferential rights. This would be a denial of equal protection to another segment of citizens."

This Court, in *Kramer* and *Cipriano*, left open the question of whether a state might under some set of circumstances qualify the franchise by limiting access to the ballot to those "primarily interested."

Appellant further contends that the Texas election laws do not create a classification at all. Since Texas law subjects *all* property to taxation, the only additional qualification required for eligibility to vote in a general obligation bond election is that of rendering property for taxation. Electors, such as appellees, who have either ignored or who refuse to comply with their legal duty to render their property simply disenfranchise themselves. Also, as was the situation in the absentee ballot case of *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 807 (1969), there is no evidence that the applicable Texas election laws absolutely prohibit anyone from exercising the franchise. *Kramer*, at 627. More recently in *Rosario v. Rockefeller*, 410 U.S. 752 (1973), this Court, in reviewing cases cited for the proposition that the New York political party enrollment deadline disenfranchised otherwise qualified voters unconstitutionally, stated at 36 L. Ed. 2d 6 and 7:

"In each of those cases, the State totally denied the electoral franchise to a particular class of residents, and there was no way in which the members of that class could have made themselves eligible to vote. . .

***

Hence, if their (petitioners) plight can be characterized as disenfranchisement at all, it was not caused by § 186, but by their own failure to take timely steps to effect their enrollment."

The District Court characterized this contention as capable of supporting an impermissible poll tax. *Harper v. Virginia State Board of Electors*, 383 U.S. 663 (1966). Also, the District Court concluded that *Rosario* was inapplicable here because New York's enrollment requirement ". . . was a reasonable state effort to preserve the integrity of the electoral process, a goal the Court called 'legitimate and valid.' The Texas rendering requirement, by contrast, is primarily an attempt to aid the states' taxation efforts, and is not designed to protect or improve the electoral process."

The District Court, although certainly recognizing the tax collection aspects of the Texas rendering sys-

tem, failed to recognized the valid state interest in protecting the integrity and quality of the electoral process through the rendering requirement. Since only property renderers will ever be called upon to repay the bonded indebtedness, and the definition of property in Texas is so universal in scope, the state has a sufficient interest in seeking to exclude those not "primarily interested" in the election subject. Indeed, it is essentially the responsibility of the state to establish reasonable "... standards designed to promote the intelligent use of the ballot." *Lassiter*, at 51. In light of this duty, it is entirely rational for the Texas election laws to exclude non-renderers in tax bond elections since they have no cognizable incentive to vote either cautiously or intelligently. Indeed, non-renderers have no reason to vote against any such tax proposal at all. Such a non-renderer would stand to reap benefit without corresponding burden. By excluding those otherwise qualified voters who refuse to render their own property according to the laws of this State while attempting to impose a tax on the property of others, the Texas election laws create a minimal qualification requirement which serves to protect and enhance the electoral process, whereas a poll tax is nothing more than a fee for the privilege of voting, having nothing to do with voter qualifications.

In *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court summarized the historical application of the Fourteenth Amendment stating that ". . . the concept of equal protection has been traditionally viewed as re-

quiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged." This Court has recognized that the traditional application of the Equal Protection Clause was restricted to a view of the "reasonableness" of the state classification made the subject of complaint. *McGowen v. Maryland*, 366 U.S. 420, 426 (1961). Indeed, it was not until *Kramer* that state voter qualifications came under the full impact of the strict judicial scrutiny of the compelling-state-interest test. *Dunn v. Blumstein*, 405 U.S. 330, 363 (1972) (Blackmun, J., concurring).

Mr. Chief Justice Burger dissenting in *Dunn* pointedly described the impracticality of the compelling-state-interest test stating that

> "The holding of the Court in Pope v. Williams, 193 U.S. 621, 24 S. Ct. 573, 48 L.Ed. 817 (1904), is as valid today as it was at the turn of the century. It is no more a denial of equal protection for a State to require newcomers to be exposed to state and local problems for a reasonable period such as one year before voting, than it is to require children to wait 18 years before voting. Cf. Oregon v. Mitchell, 400 U.S. 112, 91 S.Ct. 260, 27 L. Ed. 2d 272 (1970). In both cases some informed and responsible persons are denied the vote, while others less informed and less responsible are permitted to vote. Some lines must be drawn. To challenge such lines by the 'compelling state interest' standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection."

Mr. Chief Justice Burger's dissent in *Dunn* foreshadowed the rendition of four decisions by this Court in 1973 which further illustrate the inadequacy of the compelling-state-interest test as an equal protection standard, as well as confining it to restricted circumstances, if not actually forewarning of its eventual demise.

In *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973), Mr. Justice Rehnquist expressing the view of six members of this Court held that the provisions of the California Water Code which permitted only landowners to vote in water storage district general elections and by apportioning votes in the election according to the assessed valuation of the land to be constitutionally permissible. This Court went to great lengths to explain that by reason of the water storage district's limited purpose and its disproportionate effect on landowners as a group, the California laws did not deny equal protection by limiting the franchise to district landowners, thereby denying the vote to non-landowner residents, even though they may be farm lessees, or by weighting votes according to the assessed valuation of the land. Although obviously dealing with state qualifications on the franchise which "absolutely prohibited" interested persons, otherwise qualified to vote, from exercising the franchise, *Kramer*, at 627; *McDonald*, at 807-808, this Court in *Salyer* refused to apply the compelling-state-interest test. Rather, this Court returned to the more

practical *McGowan* test stating that

> ". . . the question for our determination is not whether or not we would have lumped them together had we been enacting the statute in question, but instead whether 'if any state of facts reasonably may be conceived to justify' California's decision to deny the franchise to lessees while granting it to landowners. McGowan v. Maryland, 366 U.S. 420, 426, 6 L. Ed. 2d 393, 81 S. Ct. 1101 (1961).

Mr. Justice Douglas, speaking for the dissent stated that

> "Provisions authorizing a selective franchise are disfavored, because they 'always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives.' Kramer v. Union School District, 395 U.S. 621, 627, 23 L. Ed. 2d 583, 89 S. Ct. 1886. In order to overcome this strong presumption, it had to be shown up to now (1) that there is a compelling state interest for the exclusion, and (2) that the exclusions are necessary to promote the State's articulated goal. Phoenix v. Kolodziejski, supra; Cipriano v. City of Houma, 395 U.S. 701, 23 L. Ed. 2d 647, 89 S. Ct. 1897; Kramer v. Union School District, supra. See also Police Jury of Vermillion Parish v. Hebert, 404 U.S. 807, 30 L. Ed. 2d 39, 92 S. Ct. 52; Stewart v. Parish School Board of St. Charles, 310 F. Supp. 1172, aff'd., 400 U.S. 884, 27 L. Ed. 2d 129, 91 S. Ct. 136."

The dissent went on to point out that the characterization of the water storage district as a "special-purpose unit of government assigned the performance of func-

tions affectiving definable groups of constitutents more than other constituents," citing *Avery v. Midland County*, 390 U.S. 474, 485 (1968), was unrealistic in view of *Hadley v. Junior College District*, 397 U.S. 50 (1970). This Court in *Hadley* applied the compelling state interest test because the special purpose junior college district exercised generalized powers which "... while not fully as broad as those of the Midland County Commissioners, certainly show that the trustees *perform important governmental functions ... and have sufficient inmpact throughout the district* to justify the conclusion that the principle which we applied in *Avery* should also be applied here." (Emphasis added by the Court).

On the same day that *Salyer* was handed down, this Court rendered a per curiam decision in *Associated Enterprises, Inc. v. Toltec Watershed Improvement District*, 410 U.S. 743 (1973). In *Associated Enterprises*, this Court determined that a Wyoming law providing that a watershed district could be established only by referendum in which only landowners could vote and their votes were weighted according to acreage owned was constitutionally valid. Again, this Court based its decision on the premise that the watershed district was a special-purpose unit of government with limited purposes. Quite significantly however, this Court went on to note that no denial of equal protection was involved because the challenged statute "... was enacted by a legislature in which all of the State's electors have the

unquestioned right to be fairly represented ..." and because the popularly-elected board of supervisors of the affected conservation district must approve the creation of a watershed district. Id. , at 744 and 745.

The popular representation of all qualified voters in Texas at the state level, like those in Wyoming, is unquestioned through compliance with *Reynolds*. Likewise, there is no question that Appellees are adequately and fairly represented by the popularly-elected City Council of Fort Worth under the holding of *Avery*. Therefore, the only distinction between the non-landowner residents' relationship to the elections in *Salyer* and *Associated Enterprises* compared with the relationship of the non-rendering appellees to the tax bond elections is the difference between a "special-purpose district" and a special purpose bond election. Certainly this is a distinction without a difference.

In a third decision rendered the same day as *Salyer* and *Associated Enterprises*, this Court determined in *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973) that the Texas dual approach to public school financing was constitutional. Mr. Justice Powell speaking for the majority upheld the Texas school financing system against an equal protection challenge. The Texas school financing system, to a significant degree, apportioned school district revenues on the basis of the value of taxable property in the district. The varying wealth of each district resulted in disproportionate school revenues

being allocated to the different districts. Although no compelling reason for the Texas system was apparent, the constitutionality of the system was upheld because the majority concluded that it was rational. The compelling-state-interest test was not applied because the "fundamental" interest necessary to invoke strict judicial scrutiny was found lacking.

Significantly, this Court in *Rodriquez* decided to restrain the expansion of the "fundamental" rights analysis in equal protection cases. In the past, this Court had extended the "fundamental" rights approach to voter qualification cases even though such rights were not explicitly found in the United States Constitution. *Rodriguez,* (Marshall, J., dissenting). Furthermore, the Constitution of the United States has never specifically guaranteed the right to vote in state elections. *Minor v. Happersett,* 88 U.S. (21 Wall.) 162 (1875); *Harper,* 383 U.S. at 665; *Rodriguez,* 36 L. Ed. 2d at 44.

This Court's decisions in *Salyer, Associated Enterprises, Rodriguez,* and *Rosario v. Rockefeller,* 410 U.S. 752 (1973) have been interpreted as follows:

> "In the context of voter qualifications, neither history, reason nor the Court's opinions in Salyer and Associated Enteprises suggest any basis for a distinction based upon the generality of governmental services offered. Voter qualification problems do not involve the same political sensitivities as apportionment problems, and there is no history

> of refusal to decide voter qualification cases on the grounds of non-justiciability. Accordingly, a logical inference from the limitation on the compelling state interest test as an equal protection standard in voter qualification cases to elections for officials of local units of government exercising general governmental powers is a dissatisfaction with the basic rule being limited, and a determination, at the very least, not to permit its further expansion. The recent decision in Rosario v. Rockefeller holding the compelling interest standard inapplicable to procedural limitations on voting qualifications further bears this out."

Lee, *Mr. Herbert Spencer and the Bachelor Stockbroker: Kramer v. Union Free School District No. 15,* 15 Ariz. L. Rev. 457-477 (1973). See also, *The Supreme Court, 1972 Term,* 87 Harv. L. Rev. 94-105 (1973).

The decisions of this Court in *Salyer* and *Associated Enterprises* were also analyzed by the Court of Appeals of New York in *Franklin v. Krause,* 32 N.Y. 2d 234, 298 N.E. 2d 68, 71 (1973). The Court there determined that the plan of apportionment and voting for the Nassau County board of supervisors and the system of weighted voting involved were not in violation of the Equal Protection Clause. The Court, 298 N.E. 2d at 71, stated in a footnote that:

> "In two very recent cases it was held that special-purpose units of government such as water and sewage districts could operate outside strict one man, one vote principles because they affected 'definable groups of constituents more than other constituents', and that certain groups could thus

have disproportionate voting power (Salyer Land Co. v. Tulare Lake Basin Water Stor. Dist., 410 U.S. 719, 93 S. Ct. 1224, 35 L. Ed. 2d 659 (1973); Associated Enterprises v. Toltec Watershed Improvement Dist., 410 U.S. 743, 93 S. Ct. 1237, 35 L. Ed. 2d 675 (1973). These decisions do not specifically extend to units of general local government apportionment such as we find in the instant case. There may be, however, further indication in these cases that the Supreme Court does not demand strict one man, one vote principles at the local level."

Significantly, that Court interpreted the *Salyer* and *Associated Enterprises* decisions as indicating this Court's intention to return the question of general local government apportionment plans, from a constitutional standpoint, to the "reasonableness" standard.

Judge Thornberry, in his Memorandum Opinion in this case, argues that the interest of the State of Texas in limiting the electorate to those who will be primarily affected by its outcome, i.e., those upon whom the financial burden created by the bonds will fall, is insufficient to withstand judicial scrutiny. Although Judge Thornberry admits that the principal and interest on the bonds will be paid solely from taxes on real, personal and mixed property rendered by the City's taxpayers, he concludes that the Texas laws exclude non-renderers who arguably will contribute to the repayment of the bonds indirectly through rents and purchased goods. Also, Judge Thornberry argues that the *present* rendering voters will not be exactly the same renderers

who will eventually repay the bonds due to "upward mobility" of the people and other factors.

Judge Thornberry's analysis fails to consider two important factors: first, the tax bond election will unquestionably have a direct and "disproportionate effect" on renderers, *Salyer*, at 728; *Associated Enterprises*, at 744; second, the Texas general obligation tax bond election laws do not absolutely prohibit anyone from rendering any item of property, and, therefore, qualify to vote. *Montgomery Independent School District; Kramer;* and *McDonald*. Furthermore, all those non-renderers who "indirectly" contribute to the payment of property taxes as lessees or purchasers of goods are in positions analogous to the lessees in *Salyer*. The Court in *Salyer* noted that the lessees had interests in the activities of the water storage district quite similar to that of landowners. However, this Court determined that those lessees could *bargain* with their lessors for the franchise by proxy. Also, it was reasoned that ". . . just as the lessee may by contract be required to reimburse the lessor for the district assessments so he may by contract acquire the right to vote for district directors." *Salyer*, at 733. Therefore, the lessees were not absolutely disenfranchised nor were they denied equal protection, although excluded from the franchise by state law, even though their lease contracts *required* the lessee to carry the proportionate share of the districts financial burden ostensibly assessed against and to be paid by his lessor. Obviously, non-renderers are

not denied equal protection of the laws by virtue of the Texas rendering qualification since they have either ignored or refused to render some item of property, as required by law, even though they may be indirectly contributing to the payment of taxes which will be used to retire the bond indebtedness made the subject of the election. Judge Thornberry's concern with the fact that the present voting renderers will not be the same ones who will eventually repay the bonds simply fails to recognize the fact that the *exact* same voters who cast votes in *any* election of any duration, will not be the exact same people who will have to abide by that decision as time passes.

CONCLUSION

This appeal raises an issue of fundamental importance to both the public improvement financing system and voter qualification standards of the states and their political subdivisions. This Court has never directly considered the facts nor the law applicable to the Texas election laws involved in this appeal. The recent decisions of this Court evidence a willingness to reconsider and apply the "reasonableness" test of *McGowan* as an equal protection standard regarding the issue of voter qualifications at the local government level. Therefore, it is submitted that the question presented by this appeal is so substantial as to require plenary consideration, with briefs on the merits and oral argument, for its consideration.

Respectfully submitted,

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APPENDIX A

Judgment and Memorandum Opinion of District Court

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

Michael L. Stone, et al.,	()	
	()	
Plaintiffs,	()	
	()	
	()	
	()	
versus	()	Ca-4-1975
	()	
	()	
	()	
The City of Fort Worth,	()	
et al.,	()	
	()	
Defendants	()	

JUDGMENT

This cause having come on for trial at which all parties were present by counsel; and the Court having considered the pleadings, evidence and argument of counsel and being of the view that a decree should be entered in accordance with the opinion of the Court, which also constitutes the Court's findings of fact and conclusions of law under F.R. Civ. P. 52 (a), filed this date, it is therefore ORDERED, ADJUDGED and DECREED:

FIRST. That the individually named plaintiffs in this action represent a class of plaintiffs composed of all those casting ballots in favor of Proposition Two in the election held by the City of Fort Worth on April 11, 1972.

Second. That Article VI, Section 3 and Section 3a of the Texas Constitution, Articles 5.03, 5.04, and 5.07 of the Texas Election Code, and Section 19, Chapter 25, of the Fort Worth City Charter are hereby declared unconstitutional insofar as they condition the right to vote in bond elections on citizens' rendering property for taxation.

Third. The defendants herein, their respective agents, servants, employees and successors, are hereby enjoined and prohibited from giving any force or effect to the laws named in paragraph second, insofar as they

are now constitutionally invalid, in assessing the validity of votes cast in Fort Worth's April 11, 1972, election by persons who had not rendered taxable property in such City for taxation. The defendants shall consider Proposition Two (library bonds) to have been approved by the voters participating in that election. This shall not be construed as compelling the issuance of such bonds by the City of Fort Worth.

Fourth. The defendants herein, their respective agents, servants, employees and successors, are hereby enjoined and prohibited from giving any force or effect to the laws named in paragraph second in any bond election held from this date on, insofar as those laws require citizens to render taxable property in such City for taxation as a prerequisite to voting.

Fifth. This decree is intended in no way to render invalid bond elections already held or bonds already issued.

Sixth. This judgement shall be stayed for the period of ten days to enable the parties to submit an application for stay to the Circuit Justice, the Supreme Court, or a Justice thereof.

Dated this 25th day of March, 1974.

Homer Thornberry
United States Circuit Judge

Leo Brewster
United States District Judge

Halbert O. Woodward
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

Michael L. Stone, et al.,	()	
	()	
Plaintiffs,	()	
	()	
	()	
	()	
versus	()	CA-4-1975
	()	
	()	
	()	
The City of Fort Worth, et al.,	()	
	()	
	()	
Defendants	()	

Before THORNBERRY, Circuit Judge, and BREWSTER and WOODWARD, District Judges.

MEMORANDUM OPINION

THORNBERRY, Circuit Judge:

This class action challenges the constitutionality of state and city laws which restrict suffrage in bond elections to persons who have made available for taxation some item of real, personal, or mixed property.[1] We believe the defendants[2] have failed to demonstrate that this diminution of the electorate is necessary to promote a compelling state interest and therefore declare the provisions attacked to be in violation of the equal protection clause of the Fourteenth Amendment.

I.

On April 11, 1972, the city of Fort Worth, Texas, held a bond election that submitted to the voting public two proposed bond issues, one for transportation bonds and one for library bonds. The voters approved the transportation bonds without incident, and the bonds have been sold. The library bonds were not so successful.

Under the laws of Texas[3] and the city charter of Fort Worth,[4] one must have some item of property on the tax rolls to be eligible to vote in a bond election. The property may be of any tpe—real, personal, or mixed. It can be of any value so long as it is not covered by an exemption.[5] One's eligibility depends upon his making the property available for taxation ("rendering" it), not

upon paying the tax. In theory at least, one might gain eligibility by rendering his wrist watch, clothing, or any common item of personal property.

The Texas Supreme Court has held that the rendering requirement is constitutional. Montgomery Independent School District v. Martin, 464 S.W.2d 638 (Tex. 1971). The U.S. Supreme Court, however, has held similar voting prerequisites unconstitutional.[6] To ensure the validity and marketability of the transportation and library bonds, should they be approved, the City of Fort Worth held two separate but simultaneous elections on April 11, 1972. This was done by separately tabulating the votes of those who owned taxable property in Fort Worth and had rendered it for taxation, and those who had not rendered property for taxation. Both groups, the renderers and the non-renderers, approved the transportation bonds by a majority vote. But the library bonds were given a mixed reception at the polls. A majority of the renderers rejected the proposal to issue library bonds, but the non-renderers approved it by a three-to-one margin. Adding together the votes of both groups showed that a majority of all the voters participating favored issuing the library bonds.[7] The net result was the library bonds could be sold only if the non-renderers were constitutionally entitled to vote despite the contrary Texas and Fort Worth laws. Convinced that the Texas rendering requirement was constitutionally valid, the city fathers of Fort Worth refused to sell the library bonds, precipitating this law-

The individual plaintiffs in this case seek to represent a class composed of all those who voted for Proposition Two, the library bonds. Having measured these representatives and their proposed class against the criteria of F.R. Civ. P. 23, we believe the class and representatives are proper. A total of 14,607 persons voted for Proposition No. 2, making the class too numerous for joinder of all. The class members have a common question of law: whether the provisions in question are consistent with the principles of equal protection. The claims of the representatives are identical with those of the class. The plaintiffs' excellent brief leaves no doubt that they will fairly and adequately protect the interests of the class. And the defendants have refused to act on grounds generally applicable to the class by blocking issuance of the bonds because existing law requires approval by a majority of the rendering property owners who cast ballots. Thus we conclude that this is a proper class action under F.R. Civ. P. 23(b)(2). Having established the plaintiffs' class character, we turn now to their grievance.

II.

Plaintiffs' equal protection arguments are bottomed upon the theory that the state, through its rendering requirement, has divided its otherwise eligible voters into two classifications, one of which cannot vote in bond elections. We think this theory is correct.

Defendants appear to argue that the state has made no one ineligible to vote and thus has created no classifications. They say that since Texas law subjects *all* property to taxation, anyone who is willing to render his property may vote. Voters choosing not to render their property simply disenfranchise themselves.* Defendants' argument proves too much; it would also support a poll tax, a practice long since declared an impermissible burden on the right to vote. Harper v. Virginia State Board of Electors, 1966, 383 U.S. 663, 86 S. Ct. 1079. The poll tax, too, was a trivial financial requirement that virtually everyone could meet. It is sheer sophistry to say the classes create themselves, or that the voters disenfranchise themselves, when the state requires would-be voters to meet requirements entirely irrelevant to the needs of sound election administration or voter competence.

We might add that we suspect the Texas rendering requirement has created a class of citizens who own too little property to merit a vote in bond elections. The record fails to indicate the number of people who render for taxation personalty other than automobiles, but we doubt that many do. *Cf.* Stewart v. Parish School Board, E.D. La. 1970, 310 F. Supp. 1172, *aff'd mem.*, 400 U.S. 884, 91 S. Ct. 136. If, as a practical matter, non-automobile personalty virtually is never rendered, and rendering an item of property is a prerequisite to voting, then Texas has disenfranchised an indeterminate number of citizens who possess neither real estate nor

car. Thus these laws on their face disenfranchise those who own property but do not render it, and in practice may well deny the ballot to a group of citizens whose possessions have been adjudged too meager.

III.

A brief survey of the relevant case law will place plaintiffs' case in perspective. We start with the proposition that the states have "broad powers to determine the conditions under which the right of suffrage may be exercised." Lassiter v. Northampton Election Board, 1959, 360 U.S. 45, 50, 79 S. Ct. 985, 989. But "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." Harper v. Virginia Board of Elections, 1966, 383 U.S. 663, 665, 86 S. Ct. 1079, 1081. *See* Evans v. Cornman, 1970, 398 U.S. 419, 90 S. Ct. 1752. When a state excludes citizens from the electorate, it must justify the exclusions under the harsh "compelling state interest" test. Kramer v. Union Free School District, 1969, 395 U.S. 621, 89 S. Ct. 1886; Cipriano v. City of Houma, 1969, 395 U.S. 701, 89 S. Ct. 1897; City of Phoenix v. Kolodziejski, 1970, 399 U.S. 204, 90 S. Ct. 1990; Dunn v. Blumstein, 1972, 405 U.S. 330, 92 S. Ct. 995. The test has two steps: (1) whether the exclusions are necessary to promote the state's articulated interest and (2) whether the interest is compelling. *Kramer, supra.* To qualify as necessary, exclusions must be tailored with precision. *E.g., Dunn v.*

Blumstein, supra. And the state must pursue its compelling interest in the way that burdens constitutionally protected activity least. *Id.*

IV.

Defendants advance two state interests that are served by excluding non-renderers from bond elections. The first interest is limiting the ballot to those who have a financial stake in the election's outcome. This interest is based on notions of fairness: those whose taxes will service the bonds should be the only ones deciding whether the debt is worth undertaking. To permit non-renderers a "free ride," we are told, would be tantamount to depriving the renderers of their property without due process, and would at least constitute preferential treatment.

The other (and primary) interest advanced is the necessity of encouraging the citizens to render their property so that the public treasury will be fortified by an efficiently collected property tax. *See* Montgomery Independent School District v. Martin, 464 S.W. 2d 638 (Tex. 1971); Markowsky v. Newman, 136 S.W. 2d 808. (Tex. 1940). We shall subject these state interests to close judicial scrutiny and the compelling interest test.

We examine first the state's interest in limiting the electorate to those who will be primarily affected by its outcome, i.e., those who will pay the financial obliga-

tion created by the bonds. Defendants' argument is strengthened by the fact that the City of Fort Worth intends to issue general obligation bonds, not revenue bonds. Revenue bonds are serviced by the income from the enterprise they finance. General obligation bonds are serviced by general tax revenues. In this case the parties have stipulated that the proposed library bonds' principal and interest will be paid from taxes on real, personal, and mixed property rendered by the city's taxpayers. Thus the impact on property owners is significantly greater than it was in similar cases decided by the Supreme Court. For example, in City of Phoenix v. Kolodziejski, 1970, 399 U.S. 204, 90 S. Ct. 1990, more than half of the debt service requirements were to be satisfied from taxes paid by nonproperty owners. By contrast, the Fort Worth library bonds will be serviced entirely by property taxes.

Despite the proposed bonds' direct impact on renderers, we are reluctant to say the state has a compelling interest in confining the electorate to the current rendering property owners. *See* Stewart v. Parish School Board, E.D. La. 1970, 310 F. Supp. 1172, 1181. The Supreme Court has reserved judgment on whether such a goal is permissible, let alone of compelling importance.[9] Kramer v. Union Free School District, 1969, 395 U.S. 621, 89 S. Ct. 1886; Cipriano v. City of Houma, 1969, 395 U.S. 701, 89 S. Ct. 1897. And the fact that the *Kramer* Court put other interests in the election's outcome on a par with the taxpayers' obligation to pay indicates that financial stake alone cannot be considered a compelling interest. *See* Comment, The Supreme Court 1968 Term, 83 Harv. L. Rev. 7, 80 (1969). Since the compelling qualities of this state interest are much in doubt, we will pretermit the question and answer the easier inquiry of whether it is necessary to exclude non-renderers from the electorate in order to achieve the goal of confining bond election suffrage to those who will pay the debt created.

Close judicial scrutiny reveals that Texas' classificatory is too imprecise to withstand an equal protection attack. It presumes that only those who render property will pay for the bonds approved. In reality, at least some of the renderers will pass on to non-renderers their portion of the bonds' cost. The property tax paid by a business establishment, for example, is sure to be passed on to customers in the form of higher prices. By patronizing the business the purchaser pays for a small part of the bonds. Yet Texas would exclude him from the bond election. The same is true of the non-renderer who rents an apartment or house. His rent pays the landlord's property taxes, which in turn service the bonds.

Moreover, Texas assumes that because a citizen is a non-renderer on election day he will never render property and thus never help pay for the bonds approved. Such an outlook is myopic, for bonds can represent long term financial obligations. For example, Fort Worth's

proposed library bonds would not be completely retired for forty years. In a society where upward mobility is commonplace, it is untenable to assume that because on election day one has rendered no property, perhpas because he owns nothing worth rendering, he will pay no property taxes for the next forty years. Today's renter may purchase a home tomorrow, and with the house will come property taxes and his share of the city's bonded debt. By the same token it is by no means certain that one who is a rendering property owner on election day will maintain that status for the bonds' life.

Since Texas' classificatory scheme fails to enfranchise all of those who will pay the bonds' cost, we conclude that the renderer/non-renderer classifications are too imprecisely drawn to further the state's articulated interest and hence cannot be termed "necessary." Consequently, even if the interest in limiting the ballot to those who will pay for the bonds is compelling, it will not justify the laws challenged here. We note in passing that Texas could pursue this same interest just as easily by broadening the tax base instead of narrowing the franchise.

The other state interest advanced to justify disenfranchising Texas' non-renderers is maintaining a credible penalty that will encourage voluntary rendering, which in turn enriches the state and city treasuries. This argument contends that some coercive threat is necessary to force the citizens to reveal their easily

concealed personalty to the tax assessor. If we do not tie rendering to the right to vote, the citizens will hide their personalty and property tax collection will become a very expensive, if not impossible, proposition.

Again we apply the compelling state interest test, this time asking whether the Texas disenfranchisement scheme is necessary to the state's goal of taxing personalty and enriching the fisc. After examining the defendants' argument in support of the necessity for thus limiting the franchise, we find it has several fatal flaws.

Defendants' concern with the concealability of personalty assumes that a substantial amount of property tax revenue comes from personalty other than automobiles. Autos are scarcely concealable; after all, they must be registered with the state. The record, however, does not disclose the amount of non-automobile personal property tax revenue, and we think it unlikely that the amount is great.

A second problem is that the laws appear poorly designed to achieve their purpose of bringing in revenue. One can vote without rendering *all* his property. In fact, he must render only one item. Tex. Election Code Ann. art. 5.04 (a) (Supp. 1973). *See* Note, 49 Texas L. Rev. 1113, 1118 (1971). And in Montgomery Independent School District v. Martin, 464 S.W. 2d 638 (Tex. 1971) the Texas Supreme Court emphasized that one may

vote if he renders property of any value. No piece of property is too insignificant or worthless. If disenfranchisement can be avoided by rendering only a small portion of one's property, and a nearly valueless portion at that, how does the state further its interest in protecting the fisc?[10] *See* Turner v. Fouche, 1970, 396 U.S. 346, 90 S. Ct. 532.

Third, we cannot believe that without the disenfranchisement device Texas will be unable to collect property taxes. At least thirty-six states have found workable alternatives, for they permit all qualified voters to vote in general bond elections. City of Phoenix v. Kolodziejski, 1970, 399 U.S. 204, 90 S. Ct. 1990; Stewart v. Parish School Board, E.D. La. 1970, 310 F. Supp. 1172, n. 1. The Supreme Court has said that those thirty-six states "do not appear to have been significantly less successful in protecting property values and in soundly financing their municipal improvements." City of Phoenix v. Kolodziejski, *supra* at 399 U.S. 214, 90 S. Ct. 1996. The differing practice in those states convinces us that Texas can find an alternative tax collection device, and that disenfranchisement is not necessary to the furtherance of Texas' interest in efficient property taxation.[11]

Since we have decided that the rendering requirement cannot be called necessary, we need not resolve the question whether property tax collection is a compelling state interest. We simply note in passing that

tax collection, while unquestionably important, probably lacks compelling importance in the context of voting rights because it is irrelevant to the electoral process. Certainly a state could not justify a poll tax on the ground that the treasury was low. *Cf.* Harper v. Virginia State Board of Elections, 1966, 383 U.S. 663, 86 S. Ct. 1079; United States v. Texas, W.D. Texas 1966, 252 F. Supp. 234, *aff'd mem.* 384 U.S. 155, 86 S. Ct. 1383.

To summarize, today we hold that Texas and Fort Worth unconstitutionally have impeded their citizens' right to vote by disenfranchising those who have failed to render property for taxation. The laws in question violate the Constitution's equal protection clause by restricting the electorate when less constitutionally burdensome avenues are available for pursuing the state's articulated interests. They further violate the citizens' right to equal protection of the laws by creating imprecisely drawn classifications which do not achieve the state's desired goals. Therefore we grant the declaratory and injunctive relief necessary to ensure that all the qualified voters in Texas will be able to vote in future bond elections regardless of whether they have rendered property for taxation. Our decree shall also require the defendants to consider Fort Worth's proposed library bonds as approved by the voters participating in the election of April 11, 1972.

With the exception of that election, we shall order prospective relief only. We recognize that many com-

munities have relied on the Texas law and have approved or disapproved bonds in elections that excluded the votes of citizens not rendering property for taxation. It would not be in the public interest to disrupt the orderly processes of government by upsetting past elections.

WOODWARD, District Judge, specially concurring:

I concur with the result reached in Judge Thornberry's Memorandum Opinion. My concurrence is based upon the teachings of *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966). The requirement that a person render property for taxation is tantamount to a requirement that a person own property before he may vote in an election authorizing the issuance of tax bonds. The ownership of property, like race, creed or color, has no relationship to one's ability to participate intelligently in the electoral processes, and a State may only limit the eligibility requirements of voters to those factors which would affect a citizen's ability to intelligently cast his vote. The defendants here, however, have attempted to limit participation in the election in question to those citizens who own property. Further, the challenged laws place the same limitations on other elections. The defendants, therefore, have exceeded the powers rightfully belonging to a state or any political subdivision thereof and it is my opinion that the statutes and ordinances in question have been properly held unconstitutional.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

Michael L. Stone, et al.,	)(	
	)(	
vs.	)(	CA 4-1975
	)(	
The City of Fort Worth, et al.,	)(	

BREWSTER, District Judge, concurring in result.

I reluctantly concur only in the *judgment* now being entered herein because I am unable to see a substantial distinction between this case on the one hand and City of Phoenix v. Kolodziejski, 399 U.S. 204, 90 S. Ct. 1990, 26 L. Ed. 2d 523 (1970), on the other. My oath of office binds me to follow the decisions of the Supreme Court of the United States, whether I agree with them or not.

My own views regarding the constitutionality of the restrictions on voting here involved are the same as those expressed in the dissenting opinions in Kramer v. Union Free School District, 395 U.S. 621, 89 S. Ct. 1886,

23 L. Ed. 2d 583 (1969), Dunn V. Blumstein, 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 995 (1972), and City of Phoenix v. Kolodziejski, supra. As Chief Justice Burger says in the Dunn case, 405 U.S., at 363, 31 L. Ed. 2d, at 296, the compelling state interest test, as recently applied by the Supreme Court has created a "seemingly insurmountable standard" which "demands nothing less than perfection." My feelings about the restrictions on voting imposed by the provisions of the state constitution and statutes and the city ordinance here involved coincide with those of Mr. Justice Stewart in regard to similar Arizona statutory restrictions, as expressed in the following quotation from his dissenting opinion in City of Phoenix v., Kolodziejski, supra, 399 U.S., at 218, 26 L. Ed. 2d, at 533:

> 'This is not the invidious discrimination that the Equal Protection Clause condemns, but an entirely rational public policy. . . ."

I do not agree with the reasoning of the Memorandum Opinion, but will not engage in a useless, lengthy discussion of it. However, I do feel compelled to make a few brief observations about matters in it.

There is language in the memorandum opinion which might be construed by a person not familiar with the record as indicating that the question before us is whether a restriction on voting based solely on rendition of property is constitutional. The provisions of the state constitution here involved say that the only qual-

ified electors in bond elections are persons "who own *taxable* property" in the political subdivision where such election is held, "and who have duly rendered the same for taxation."[1] The statute and the ordinance in question are to the same effect. If only rendition of some property, whether taxable or not, were required, my views about the kind of judgment to be entered would be different.

The memorandum opinion says that most automobiles and personal property are not rendered for taxation. I regard this as totally irrelevant. If it were pertinent, a look at the sworn statement of those who render their property for taxation might show that a good deal of personal property is rendered.

Finally, as I construe it, the memorandum opinion is calculated to leave the inference that most of the people who would be affected by the exclusion are those who have personal property but do not render it for taxation because nobody else does, and those who, though ambitious to make their own way, own "nothing worth rendering" today, but, being members of "a society where upward mobility is commonplace" will become substantial taxpayers tomorrow. My humble feeling is that most of these excluded will more likely be the kind who are able to earn their way but would rather live off other peoples' work. It would be safe to say that the exclusion would get everyone of the kind of people we know, as a matter of general knowledge, are in line for

the food that is being handed out by Publisher Hearst as a ransom to try to secure the release of his kidnapped daughter, and who are griping about the quality of food they are getting. My feeling is that those irresponsible people should not be allowed to vote to slap a lien on the property of someone else.

I deeply regret that I have been unable to find a legitimate way to distinguish the cases above cited.

[1] Since plaintiffs seek to enjoin the enforcement of a state statute on the grounds of its unconstitutionality, the jurisdiction of this three-judge court was properly invoked pursuant to 28 U.S.C. §§ 2281 and 2284. The case was tried upon stipulated facts.

[2] Plaintiffs joined the state attorney general because Texas law requires that he certify the legal validity of cities' proposed bond issues. Tex. Rev. Civ. Stat. Ann. art. 709d (Supp. 1973). They ask that he be required to decide the bonds' validity without regard to the laws attacked here as unconstitutional.

[3] § 3. Municipal elections; qualifications of voters

Sec. 3. All qualified electors of the State, as herein described, who shall have resided for six months immediately preceding an election, within the limits of any city or corporate town, shall have the right to vote for Mayor and all other elective officers; but in all elections to determine expenditure of money or assumption of debt, only those shall be qualified to vote who pay taxes on property in said city or incorporated town; provided, that no poll tax for the payment of debts thus incurred, shall be levied upon the persons debarred from voting in relation thereto.

Tex. Const. art. VI, § 3.

§ 3a. Bond issues; loans of credit; expenditures; assumption of debts; qualifications of voters

Sec. 3a. When an election is held by any county, or any number of counties, or any political sub-division of a county, or any defined district now or hereafter to be described and defined within the State and which may or may not include towns, villages or municipal corporations, or any city, town or village, for the purpose of issuing bonds or otherwise lending credit, or expending money or assuming any debt, only qualified electors who own taxable property in the State, county, political subdivision, district, city, town or village where such election is held, and who have duly rendered the same for taxation, shall be qualified to vote and all electors shall vote in the election precinct of their residence.

Tex. Const. art. VI, § 3a.

Art. 5.03 Qualifications for voting for bond issues, lending credit, expending money, or assuming debt

When an election is held by any county, or any number of counties, or any political subdivision of the state, or any political subdivision of a county or any defined district now or hereafter to be described and defined within the state, and which may or may not include towns, villages, or municipal corporations, or any city, town, or village, for the purpose of issuing bonds or otherwise lending credit, or expending money or assuming any debt, only qualified electors who own taxable property in the state, county, political subdivision, district, city, town, or village where such election is held, and who have duly rendered the same for taxation, shall be qualified to vote and all electors shall vote in the election precinct of their residence. Property shall be deemed to have been duly rendered for taxation, for the purpose of determining eligibility to vote in an election as provided in this code and in Article VI, Section 3a, of the Texas Constitution, only if the property was rendered to the county, city, district, or other political subdivision holding the election within the period of time fixed by law for such rendition, or was placed on the tax rolls by the tax assessor prior to the date on which the election was ordered, if the regular rendition period expired before that date.

Tex. Election Code Ann. art. 5.03 (Supp. 1973).

Article 5.04 of the election code provides in part:

Art. 5.04 Affidavit of voter in bond election, etc.

(a) Before any person is allowed to vote in an election for the purpose of issuing bonds or otherwise lending credit, or expending

money or assuming any debt, he shall sign and swear to an affidavit to the effect that he owns property, giving a description of one item, which has been duly rendered for taxation to the political subdivision holding the election at a time and in a manner which entitles him to vote in the election, as provided in Section 35 (Article 5.03) of this code. The voter's registration certificate number shall be shown on the affidavit, and it shall contain a statement that the affiant understands that the giving of false information in the affidavit is a felony punishable by a fine not to exceed $5,000 or by imprisonment in the penitentiary not to exceed five years, or by both such fine and imprisonment.

Tex. Election Code Ann. art. 5.04 (a) (Supp. 1973).

Art. 5.07 To vote in city elections

All qualified electors of this State, as described in the two preceding Sections [Arts. 5.05, 5.06]who shall have resided for six (6) months immediately preceding an election within the limits of any city or incorporated town shall have a right to vote for mayor and all other elective officers, but in all elections to determine the expenditure of money or assumption of debt, or issuance of bonds, only those shall be qualified to vote who own taxable property in the city or town where such election is held and who have duly rendered the same for taxation; and all electors shall vote in the election precinct of their residence.

Tex. Election Code Ann. art. 5.07 (1967).

[4] The city charter provides, in pertinent part:

Section 19. Issuance and Sale of Bonds. — The City Council shall have authority to provide for the issuance and sale of bonds for permanent improvements and for any other legitimate municipal purpose as may be determined by the City Council; but no bonds shall be issued to fund any overdraft or indebtedness incurred for current expenses of the city government, or any subdivision thereof. The City Council shall also have the right to fund any maturing bonds by the issuance of new bonds in lieu thereof at the same or a lower rate of interest. No bonds shall be issued or refunded that bear a greater rate of interest than five per cent per annum, and the same shall never be sold for less than par and accrued interest, and all bonds shall express upon their face the purpose of purposes for which they are issued.

No bonds shall be issued unless authorized by ordinance, which ordinance shall provide an adequate fund from the taxes for the payment of the annual interest and sinking fund of not less than two per cent per annum for the ultimate redemption of such bond issue, and such ordinance shall become effective without the necessity of publication. *Provided, that no bonds shall be issued, nor bonded debt created, unless authority therefor shall first be submitted to the qualified voters who pay taxes on property situated within the corporate limits of the City of Fort Worth;* and, if a majority of the votes cast at such election are in favor of the issuance of such bonds, then such issue shall be made; but, should the majority of the votes cast at said election be against the proposition, then such bonds shall not be issued. . . . [Emphasis supplied.]

Charter of the City of Fort Worth, ch. 25, § 19.

[5] In Texas, "[a]ll property, real, personal, or mixed, except such as may be hereinafter expressly exempted, is subject to taxation, ..." Tex. Rev. Civ. Stat. Ann. art. 7145 (1960). While all property is taxable unless exempt, the exemptions are numerous. *See, e.g.*, Tex. Rev. Civ. Stat. Ann. art. 7150 (1960). For the purposes of this lawsuit the most significant exemption is in § 11 of article 7150: "All household and kitchen furniture not exceeding at their true and full value two hundred and fifty dollars to each family, in which may be included one sewing machine." Tex. Rev. Civ. Stat. Ann. art. 7150 (11) (1960).

[6] City of Phoenix v. Kolodziejski, 1970, 399 U.S. 204, 90 S. Ct. 1990; Cipriano v. City of Houma, 1969, 395 U.S. 701, 89 S. Ct. 1897; Kramer v. Union Free School District, 1969, 395 U.S. 621, 89 S. Ct. 1886.

[7] The election results were as follows:

	Owners of Property Rendered for Taxation	Non Renderers	Total
Proposition One			
For	13,466	4,094	17,560
Against	9,834	850	10,684
Proposition Two			
For	10,849	3,758	14,607
Against	12,234	1,132	13,366

[8] *Cf.* Rosario v. Rockefeller, 1973, ___ U.S. ___, 93 S. Ct. 1245. *Rosario* contains language that some might interpret to support the contention that non-rendering citizens are disenfranchising themselves, with no help from the state. In *Rosario* the plaintiffs challenged a New York law requiring those who wish to vote in a particular party primary to enroll in that party at least 30 days prior to the last general election preceding the primary. Plaintiffs claimed that those who failed to enroll in time, and thus were refused the right to vote in the primary, were being deprived of their right to equal protection. The Court rejected that contention, saying that if plaintiffs were disenfranchised, they had disenfranchised themselves by failing to enroll.

We believe *Rosario* is inapposite. New York's enrollment requirement was a reasonable state effort to preserve the integrity of the electoral process, a goal the Court called "legitimate and valid." The Texas rendering requirement, by contrast, is primarily an attempt to aid the state's taxation efforts, and is not designed to protect or improve the electoral process. Party enrollment, like registration, is an integral part of elections, and the state is fully justified in setting deadlines and cutoff dates necessary to administrate the electoral process. And an unavoidable concomitant of registration and enrollment is voluntary action by the individual voter. One cannot argue that voluntary submission to taxation is necessary to the administration of elections.

[9] *But cf.* Salyer Land Co. v. Tulare Lake Basin Water Storage District, 1973, ___U.S. ___, 93 S. Ct. 1224. In that case the Court approved an election in which the right to vote for directors of a water district was limited to landowners and apportioned according to the extent of the voter's holdings. The case is distinguishable becaue the Court emphasized that a water district is a governmental unit with a special limited purpose and a limited scope of authority. Therefore, the "one person, one vote" principle did not apply. It is inescapable that that principle does apply to the City of Fort Worth, a unit of local government exercising general governmental power.

[10] The ease with which citizens may meet Texas' rendering requirements does not buttress the defendants' argument that plaintiffs have not suffered discrimination. The Supreme Court has

said:

> To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant.

Harper v. Virginia State Board of Electors, 1966, 383 U.S. 663,668, 86 S. Ct. 1079, 1082.

[11] *Cf.* Dunn v. Blumstein, 1972, 405 U.S. 330, 92 S. Ct. 995.

> Statutes affecting constitutional rights must be drawn with "precision," . . . and must be "tailored" to serve their legitimate objectives. . . . And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose "less drastic means."
> [Citations omitted.]

405 U.S. at 343, 92 S. Ct. at 1003.

[1] The quotations are from Art. VI, Sec. 3a, of the Constitution of Texas.

APPENDIX B

Notice of Appeal

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF FORT WORTH DIVISION

Michael L. Stone, et al., *Plaintiffs*	)(	
	)(	Civil Action
v.	)(	
	)(	No. 4-1975
The City of Fort Worth, et al., *Defendants*	)(	

NOTICE OF APPEAL TO THE

SUPREME COURT OF THE UNITED STATES

Notice is hereby given that John L. Hill, Attorney General of the State of Texas, Defendant in the above named case, hereby appeals to the Supreme Court of the United States from the final order granting a permanent injunction entered in this action on the 25th day of March, 1974.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

MIKE WILLATT
Assistant Attorney General

G. CHARLES KOBOISH
Assistant Attorney General

Box 12548, Capitol Station
Austin, Texas 78711

(Note: Filed with District Clerk on April 18, 1974.)

PROOF OF SERVICE

I, Mike Willatt, an attorney in the Office of the Attorney General of Texas, Appellant herein, depose and say that on the _____day of _____, 1974, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto, as follows:

(1) on Michael L. Stone, et al, Plaintiffs by mailing a copy in a duly addressed envelope with first class postage prepaid, addressed to Mr. Don Gladden and Mr. Marvin Collins, counsel of record for the Plaintiffs, located at 702 Burk Burnett Building, Fort Worth, Texas 76102.

(2) on R.M. Stovall, Mayor; S.G. Johndroe, Jr., City Attorney; Roy A. Bateman, City Secretary; Leonard E. Briscoe, Taylor Gandy, Jess M. Johnston, Jr., W.S. Kemble, Jr., John O'Neill, Ted C. Peters, Pat Reece, Mrs. Margaret Rimmer, council members; and the City of Fort Worth, a municipal corporation, by mailing a copy in a duly addressed envelope, with first class postage prepaid, addressed to Mr. S.G. Johndroe, Jr., City Attorney, Attorney for Defendants, located at 1000 Throckmorton Street, Fort Worth, Texas 76102.

All parties requried to be served have been served.

MIKE WILLATT
Assistant Attorney General

Subscribed and sworn to before me, at _____ this ____ day of _____, 1974.

Notary Public

APPENDIX C

Full text of:

Tex. Const. Art. VI, Section 3 (1955)
Tex. Const. Art. VI, Section 3a (1955)
Tex. Election Code Ann. Art. 5.03 (Supp. 1973)
Tex. Election Code Ann. Art. 5.04 (a) (Supp. 1973)
Tex. Election Code Ann. Art. 5.07 (1967)
Charter of the City of Fort Worth, Ch. 25, § 19

Tex. Const. Art. VI, Section 3 (1955):

§ 3 Municipal elections; qualifications of voters

Sec. 3. All qualified electors of the State, as herein described, who shall have resided for six months immediately preceding an election, within the limits of any city or corporate town, shall have the right to vote for Mayor and all other elective officers; but in all elections to determine expenditure of money or assumption of debt, only those shall be qualified to vote who pay taxes on property in said city or incorporated town; provided, that no poll tax for the payment of debts thus incurred, shall be levied upon the persons debarred from voting in relation thereto.

Tex. Const. Art. VI, Section 3a (1955):

§ 3a. Bond issues; loans of credit; expenditures; assumption of debts; qualifications of voters

Sec. 3a. When an election is held by any county, or any number of counties, or any political subdivision of a county, or any defined district now or hereafter to be described and defined within the State and which may or may not include towns, villages or municipal corporations, or any city, town or village, for the purpose of issuing bonds or otherwise lending credit, or expending money or assuming any debt, only qualified electors who own taxable property in the State, county, political

subdivision, district, city, town or village where such election is held, and who have duly rendered the same for taxation, shall be qualified to vote and all electors shall vote in the election precinct of their residence.

Tex. Election Code Ann. Art. 5.03 (Supp. 1973):

Art. 5.03 Qualifications for voting for bond issues, lending credit, expending money, or assuming debt

When an election is held by any county, or any number of counties, or any political subdivison of the state, or any political subdivision of a county or any defined district now or hereafter to be described and defined within the state, and which may or may not include towns, villages, or municipal corporations, or any city, town, or village, for the purpose of issuing bonds or otherwise lending credit, or expending money or assuming any debt, only qualified electors who own taxable property in the state, county, political subdivision, district, city, town or village where such election is held, and who have duly rendered the same for taxation, shall be qualified to vote and all electors shall vote in the election precinct of their residence. Property shall be deemed to have been duly rendered for taxation, for the purpose of determining eligibility to vote in an election as provided in this code and in Article VI, Section 3a, of the Texas Constitution, only if the property was rendered to the county, city, district, or other political subdivision holding the election within the

period of time fixed by law for such rendition, or was placed on the tax rolls by the tax assessor prior to the date on which the election was ordered, if the regular rendition period expired before that date.

Tex. Election Code Ann. Art. 5.04 (a) (Supp. 1973):

Art. 5.04 Affidavit of voter in bond election, etc.

(a) Before any person is allowed to vote in an election for the purpose of issuing bonds or otherwise lending credit, or expending money or assuming any debt, he shall sign and swear to an affidavit to the effect that he owns property, giving a description of one item, which has been duly rendered for taxation to the political subdivision holding the election at a time and in a manner which entitles him to vote in the election, as provided in Section 35 (Article 5.03) of this code. The voter's registration certificate number shall be shown on the affidavit, and it shall contain a statement that the affiant understands that the giving of false information in the affidavit is a felony punishable by a fine not to exceed $5,000 or by imprisonment in the penitentiary not to exceed five years, or by both such fine and imprisonment.

Tex. Election Code Ann. Art. 5.07 (1967):

Art. 5.07 To vote in city elections

All qualified electors of this State, as described in the

two preceding Sections [Arts. 5.05, 5.06] who shall have resided for six (6) months immediately preceding an election within the limits of any city or incorporated town shall have a right to vote for mayor and all other elective officers, but in all elections to determine the expenditure of money or assumption of debt, or issuance of bonds, only those shall be qualified to vote who own taxable property in the city or town where such election is held and who have duly rendered the same for taxation; and all electors shall vote in the election precinct of their residence.

Charter of the City of Fort Worth, Ch. 25, § 19:

Section 19. Issuance and Sale of Bonds

—The City Council shall have authority to provide for the issuance and sale of bonds for permanent improvements and for any other legitimate municipal purpose as may be determined by the City Council; but no bonds shall be issued to fund any overdraft or indebtedness incurred for current expenses of the city government, or any subdivision thereof. The City Council shall also have the right to fund any maturing bonds by the issuance of new bonds in lieu thereof at the same or a lower rate of interest. No bonds shall be issued or refunded that bear a greater rate of interest than five per cent per annum, and the same shall never be sold for less than par and accrued interest, and all bonds shall

express upon their face the purpose of purposes for which they are issued.

No bonds shall be issued unless authorized by ordinance, which ordinance shall provide an adequate fund from the taxes for the payment of the annual interest and sinking fund of not less than two per cent per annum for the ultimate redemption of such bond issue, and such ordinance shall become effective without the necessity of publication. Provided, that no bonds shall be issued, nor bonded debt created, unless authority therefor shall first be submitted to the qualified voters who pay taxes on property situated within the corporate limits of the City of Fort Worth; and, if a majority of the votes cast at such election are in favor of the issuance of such bonds, then such issue shall be made; but, should the majority of the votes cast at said election be against the proposition, then such bonds shall not be issued. The City Council shall have full power and authority to prescribe the way and manner in which such election shall be held, the notice to be given therefor, the polling places in the various parts of the City at which the election is to be held, prescribe the form of ballot, and the other details of said election, independently of the general election laws of the State of Texas. But this requirement as to submitting the question of the issuance of bonds to a vote of the people before the same can be authorized shall not apply to the refunding of bonds heretofore issued, where the same

can be refunded at the same or a lower rate of interest, if in the judgment of the City Council the said bonds cannot be retired, either in whole or in part, at maturity. The said bonds when issued shall be submitted to and approved by the Attorney General of the State of Texas, as required by the statutes of this State, before being offered for sale in the market.

APPENDIX D

Factual Stipulations Taken From the Pre-Trial Order

FACTS ESTABLISHED BY STIPUATION

1. That the defendant City of Fort Worth is a municipal corporation located in Tarrant County, Texas, and duly organized and existing under the Constitution and laws of the State of Texas and by home-rule Charter duly adopted by its electorate in December of 1924 under the provisions of Article XI, Section 5, of the Constitution of the State of Texas.

2. That at the time of the filing of this suit, defendant Crawford Martin was the duly elected Attorney General of the State of Texas.

3. That defendant S.G. Johndroe, Jr., is the duly appointed City Attorney of the City of Fort Worth.

4. That at the time of the filing of this suit and at the present time R.M. Stovall is the duly elected Mayor of the City of Fort Worth.

5. That the defendant Roy A. Bateman is the duly appointed City Secretary-Treasurer of the City of Fort Worth.

6. That at the time of the filing of this suit and at the present time the defendants, Leonard E. Briscoe, Taylor Gandy, Jess M. Johnston, Jr., W.S. Kemble, Jr.,

John J. O'Neill, Ted C. Peters, Pat Reece and Mrs. Margret Rimmer, are the duly elected members of the City Council of the City of Fort Worth.

7. That Plaintiffs' Exhibit "A" is a true and correct copy of the Charter of the City of Fort Worth, as amended.

8. That Chapter VI of the Charter of the City of Fort Worth provides for certain duties and responsibilities of the defendant S.G. Johndroe, Jr., as City Attorney, and reads as follows:

"DEPARTMENT OF LAW"

"Section 1. In addition to the departments created and placed under the immediate control of the City Manager, there is hereby created another department, to be known as the Department of Law. The Director or head of this department shall be a competent practicing lawyer, of recognized ability, residing in the City, whose appointment shall be recommended by the Manager and approved by the Council. He shall serve for a period of two years from the date of his appointment, unless sooner discharged by the Council, either upon its own motion or upon the recommendation of the Manager, on account of his services not proving satisfactory; and of this matter the Council shall be the sole judge, and their decision with respect thereto shall be final.

"Section 2. The Director of the Department of Law shall be known as the City Attorney, and shall have power to appoint such assistants as may be

deemed necessary by him, subject to the approval of the Manager and the Council; such assistants to serve in that capacity as long as their services are satisfactory to the Council and the City Manager. The City Attorney and his assistants shall receive such compensation as may be fixed by resolution of the Council.

"Section 3. Duties of the City Attorney.—He shall be the legal adviser of and attorney and counsel for the City and for all officers and departments thereof, in all matters relating to their official duties. He shall prosecute or defend all suits for and on behalf of the City in all the courts, and shall prepare all contracts, bonds and other instruments in writing in which the City is concerned, and shall endorse on each his approval as to the form and legality thereof. No such bond, contract or instrument shall become effective without such endorsement by the City Attorney thereon.

"Section 4. He shall attend all sessions of the Council and make diligent investigation and report to the Council, or to the City Manager, or any director of departments, his opinion with respect to any legal matter submitted to him by any of them. He shall, either in person or by an assistant, act as Prosecuting Attorney in the Corporation Court. He shall prosecute all cases brought before such court and perform the same duties, as far as they are applicable thereto, as are required of the Prosecuting Attorney of the County. He shall maintain his office in the City Hall, in such place as may be provided by the Council, and shall freely confer with and advise the City Manager on all matters that may be referred to him by the City Manager. He shall prepare in correct legal form all ordinances passed by the Council.

"Section 5. The City Attorney shall apply in the

name of the City to a court of competent jurisdiction for an order of injunction to restrain any misapplication of the funds of the City, or the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the City in contravention of law, or which was procured by fraud or corruption.

"Section 6. When an obligation or contract made on behalf of the City granting a right or easement, or creating a public duty, is being evaded or violated, the City Attorney shall likewise apply for the forfeiture or the specific performance thereof, or for such relief as the nature of the case may require.

"Section 7. In case any officer or commission shall fail to perform any duty required by law, the City Attorney shall apply to a court of competent jurisdiction for a writ of mandamus to compel the performance of such duty.

"Section 8. Taxpayers' Suits.—In case the City Attorney, upon written request of three taxpayers of the City, fails to make any application provided for in any of the preceding three sections, such taxpayers may institute suit or proceedings for such purpose, in their own names, on behalf of the City; but no such suit or proceeding shall be entertained by any court until such request shall have been first made to the City Attorney, nor until the said taxpayers shall have given security for the costs of the proceedings.

"Section 9. The City Attorney and his assistants shall be responsible for the proper and efficient handling of the entire legal affairs, suits, pleas and litigation in which the City is interested. No extra counsel shall be employed to assist the City Attorney, save and except in cases of extraordinary importance and emergency, and then only on the

written recommendation of the City Manager showing the necessity and importance of employing such additional legal assistance, approved and adopted by the Council. In such contingency, the Council shall fix in advance, as far as practicable, the compensation to be allowed such extra counsel by resolution spread upon the minutes."

9. That Plaintiffs' Exhibit "B" (also identified as Exhibit I in Plaintiffs' First Amended Complaint) is a true and correct copy of Ordinance No. 6644, which ordinance was the ordinance calling the bond election held on the 11th day of April, 1972.

10. That Section 19 of Chapter XXV of the Charter of the City of Fort Worth reads as follows:

"Section 19. Issuance and Sale of Bonds.—The City Council shall have authority to provide for the issuance and sale of bonds for permanent improvements and for any other legitimate municipal purpose as may be determined by the City Council; but no bonds shall be issued to fund any overdraft or indebtedness incurred for current expenses of the city government, or any subdivision thereof. The City Council shall also have the right to fund any maturing bonds by the issuance of new bonds in lieu thereof at the same or a lower rate of interest. No bonds shall be issued or refunded that bear a greater rate of interest than five per cent per annum, and the same shall never be sold for less than par and accrued interest, and all bonds shall express upon their face the purpose or purposes for which they are issued.

"No bonds shall be issued unless authorized by ordinance, which ordinance shall provide an ade-

quate fund from the taxes for the payment of the annual interest and sinking fund of not less than two per cent per annum for the ultimate redemption of such bond issue, and such ordinance shall become effective without the necessity of publication. Provided, that no bonds shall be issued, nor bonded debt created, unless authority therefor shall first be submitted to the qualified voters who pay taxes on property situated within the corporate limits of the City of Fort Worth; and, if a majority of the votes cast at such election are in favor of the issuance of such bonds, then such issue shall be made; but, should the majority of the votes cast at said election be against the proposition, then such bonds shall not be issued. The City Council shall have full power and authority to prescribe the way and manner in which such election shall be held, the notice to be given therefor, the polling places in the various parts of the City at which the election is to be held, prescribe the form of ballot and the other details of said election, independently of the general election laws of the State of Texas. But this requirement as to submitting the question of the issuance of bonds to a vote of the people before the same can be authorized shall not apply to the refunding of bonds heretofore issued, where the same can be refunded at the same or a lower rate of interest, if in the judgment of the City Council the said bonds cannot be retired, either in whole or in part, at maturity. The said bonds when issued shall be submitted to and approved by the Attorney General of the State of Texas, as required by the statutes of this State, before being offered for sale in the market."

11. That section 29 of Chapter XXVIII of the Charter of the City of Fort Worth reads in part as follows:

"Section 29. Elections — Council to Provide for

Holding Same — Counting Returns and Declaring Result.—The City Council shall make all necessary regulations concerning elections, the manner and method of holding same, by proper ordinances enacted for that purpose. Such regulations, however, shall be in keeping with the provisions of this Charter and shall be in keeping and consistent with the provisions of the State law applicable to elections in municipalities, insofar as the same may be practicable. ***"

That Section 30 of Chapter XXVIII of the Charter of the City of Fort Worth reads as follows:

"Section 30. Oath of Office.—Every officer of the City shall, before entering upon the duties of his office, take and subscribe to an oath or affirmation, to be filed and kept in the office of the City Secretary, that he will support, protect and defend the Constitution and laws of the United States and of the State of Texas, and in all respects faithfully discharge the duties of his office or position. This provision shall apply to the City Manager and to the heads of departments."

12. That Article 709 of the Revised Civil Statutes of the State of Texas provides in part that

"Before any bonds shall be offered for sale, ***the mayor ***shall forward the bonds to the Attorney General, together with a certified copy of the order or ordinance levying the tax to pay the interest and provide a sinking fund, and a statement of the total bonded indebtedness of the ***city ***, including the series of bonds proposed, together with the amount of the assessed value of the *** city *** for purposes of taxation as shown by the last official assessment of such *** city ***. Such *** mayor

shall also furnish the Attorney General with any additional information he may require."

13. That Article 709d of the Revised Civil Statutes of the State of Texas provides in part that

> "When *** the bonds of any incorporated city *** are offered for sale, the party offering, or proposing to sell, such bonds, obligations, and pledges shall first submit them to the Attorney General, who shall carefully inspect and examine the same in connection with the law under which they were issued, and shall diligently inquire into the facts and circumstances so far as may be necessary to determine the validity thereof; and, upon being satisfied that such bonds, obligations, and pledges were issued in conformity with law, and that they are valid and binding obligations, he shall thereupon certify to their validity, and his certificate to that effect, so procured by the party offering such bonds, obligations, and pledges as the case may be, shall be submitted to the Comptroller *** with the bonds, obligations, and pledges so offered for sale, and shall be carefully preserved by the Comptroller. ***"

14. That the Attorney General of Texas has duties which include the certification of the legality of proceedings underlying the issuance of any proposed municipal bonds and the issuance of an opinion as to such legality prior to their registration by the Comptroller of Public Accounts of the State of Texas.

15. That Article 4398 of the Revised Civil Statutes of the State of Texas provides as follows:

"ATTORNEY GENERAL
***

"Art. 4398. To examine bonds

He shall carefully examine all county and municipal bonds sent to him as provided by Article 709, in connection with the facts and the Constitution and laws on the subject of the execution of such bonds, and if, as the result of such examination, he shall find that such bonds were issued in conformity with the Constitution and laws, and that they are valid and binding obligations upon the county, city, or town, by which they are executed, he shall so officially certify."

16. That prior to the holding of the election of April 11, 1972, the defendant City Secretary of the City of Fort Worth instructed each of the election judges for the bond election, and that such instruction basically required the separation of the votes of persons who owned taxable property which had been rendered for taxation from those of other qualified electors or voters who had not rendered property for taxation.

17. That the defendant City of Fort Worth and Roy A. Bateman made available two separate affidavits for voters at the polling places on April 11, 1972, one of such affidavits being for persons owning taxable property which had been duly rendered or assessed for taxation, and the other affidavit being for persons who did not wish to sign an affidavit showing ownership of taxable property which has been duly rendered or assessed for taxation. These affidavits are Plaintiffs' Exhibits

C-1 and C-2, and these exhibits are also identified as Exhibit K in Plaintiffs' First Amended Complaint.

18. That the returns of the municipal election of the City of Fort Worth held on April 11, 1972, were canvassed and approved by the City Council of said City in regular, open, public meeting on April 17, 1972, which canvass and approval reflect the following:

> "Councilman Gandy made a motion, seconded by Councilman Briscoe, that the tabulation of returns of the City of Fort Worth Bond Election held April 11, 1972, as prepared from the certified returns, submitted by the judges and clerks in each election precinct and presented by the City Secretary, be found correct, and that the votes cast on Proposition No. 1, as submitted were:

	Owners of Property Rendered for Taxation	Non Renderers	Total
For	13,466	4,094	17,560
Against	9,834	850	10,684

and that the votes cast on Proposition No. 2 were:

For	10,849	3,758	14,607
Against	12,234	1,132	13,366

> and that the tabulation of returns of said election be in all things approved and adopted. When the motion was put to a vote by the Mayor, it prevailed unanimously."

19. That prior to issuing and selling any general obligation bonds, it is a matter of necessity to publish an official notice of sale thereof; to describe and provide for terms and specifications in the sale thereof; to make provision for redemption, denomination, type of bid and interest rates, and basis of award; to provide for a good faith deposit; to provide for printing and the furnishing of the purchaser's written opinion; to provide no-litigation certificates; to provide for delivery; to regulate future sales; and to prepare and furnish an official bid form; and that after the taking of bids thereon, it is necessary to provide a complete transcript of the proceedings, to adopt an ordinance levying the tax to pay the interest and provide a sinking fund, to provide a statement of the total bonded indebtedness of the City, including the series of bonds proposed, together with the amount of the assessed value of the real, personal and mixed property in the City for purposes of taxation as shown by the last official assessment rolls, to submit the bonds to the Attorney General of Texas for inspection and certification pursuant to Article 709d of the Texas Revised Civil Statutes, and to furnish the Attorney General with any additional information that he may require.

20. That the defendant City Attorney, S.G. Johndroe, Jr., has advised the City Council of the opinion delivered March 10, 1971, in Montgomery Independent School District v. Crawford Martin, Attorney General of Texas, 464 S.W. 2d 638 (1971), wherein the Texas

Supreme Court upheld the validity of Article 6, Section 3a, of the Texas Constitution when challenged on the ground that it violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States; and the Supreme Court of Texas also found that such provision did not violate, but strengthened, the Equal Protection Clause of the Fourteenth Amendment; and that the defendant City Attorney, S.G. Johndroe, Jr., as admitted in Paragraph 22 of the Original Answer of Defendants, R.M. Stovall et al., further advised the City Council of the City of Fort Worth of the procedural steps and necessary prerequisites prior to the issuance and sale of general obligation bonds as set out above in Stipulation No. 19.

21. That the defendants, City Council members of the City of Fort Worth, when acting as a body in their official capacity as City Council members and as the duly authorized governing body of the City of Fort Worth, have the "authority to provide for the issuance and sale of bonds for permanent improvements and for any other legitimate municipal purpose as may be determined by the City Council"; and that such authority is conferred in part upon the City Council by Chapter XXV, Section 19, of the Charter of the City of Fort Worth.

22. That defendant Roy A. Bateman, in his capacity as City Secretary of the City of Fort Worth, had the following duties with respect to the April 11, 1972, City

of Fort Worth bond election as set forth in Ordinance No. 6644 of the City of Fort Worth:

"SECTION 6.

"That the official ballots to be used shall be in compliance with the applicable provisions of Article 6.05 of the Election Code of the State of Texas, as amended, and shall have written or printed thereon the following:

PROPOSITION NO. 1.

"Place an 'X' in the square beside the statement indicating the way you wish to vote.

☐FOR ☐AGAINST

Shall the City of Fort Worth, Texas, through its City Council, issue its negotiable coupon bonds in the principal sum of Three Million Dollars ($3,000,000.00) for the legitimate municipal purpose of acquiring, equipping and improving the physical equipment and personal property of the Fort Worth Transit Company, a private corporation, and acquiring the necessary lands therefor, said bonds being payable serially as may be determined by the City Council, so that the last maturing bonds shall become payable within forty (40) years from the date thereof, bearing interest at a rate not to exceed the maximum prescribed by law at the time of the issuance thereof, payable semiannually, and levy a sufficient tax to pay the interest on said bonds and create a sinking fund sufficient to redeem said bonds at the maturity thereof?

PROPOSITION NO. 2.

"Place an 'X' in the square beside the statement

indicating the way you wish to vote.

☐ FOR ☐ AGAINST

Shall the City of Fort Worth, Texas, through its City Council, issue its negotiable coupon bonds in the principal sum of Six Million, Eight Hundred Sixty Thousand Dollars ($6,860,000.00) for the purpose of making permanent city improvements by constructing, building, improving and equipping buildings for the public library system and acquiring the necessary lands therefor, said bonds being payable serially as may be determined by the City Council, so that the last maturing bonds shall become payable within forty (40) years from the date thereof, bearing interest at a rate not to exceed the maximum prescribed by law at the time of the issuance thereof, payable semi-annually, and levy a sufficient tax to pay the interest on said bonds and create a sinking fund sufficient to redeem said bonds at the maturity thereof?

"SECTION 7.

"That the City Secretary is hereby ordered and directed to prepare and issue ballots for absentee voting and for the special election and to stamp same 'Official Ballot,' on which ballots shall be printed the propositions hereinabove set forth.

******

"SECTION 10.

"That the City Secretary shall furnish election officials said ballots, together with any other forms, blanks or instructions in accordance with the Charter of the City of Fort Worth, Texas, and the laws of the State of Texas insofar as same are applicable, and the provisions of this ordinance un-

less a court of competent jurisdiction orders otherwise.

"SECTION 11.

"That the way and manner of holding this election, the notice to be given therefor, the polling places, the personnel of the officers, precinct judges and substitutes therefor who are to hold the same, and all details connected with the holding of the election shall be determined and arranged by the City Council and administered under the direction of and by the City Secretary.

******

"SECTION 13.

"That the City Secretary is hereby authorized and directed to cause notice of said election to be given by posting a substantial copy of this election order in each of the election precincts of said City and also at the City Hall. That this notice of said election shall also be published on the same day in each of two (2) successive weeks in a newspaper of general circulation published within said City, the date of the first publication to be not less than fourteen (14) days prior to the date set for said election, and the City Secretary shall see that proper publication is made and proper notice of this election is given, in full conformity with the Charter of the City of Fort Worth, Texas, and the applicable statutes of the State of Texas."

23. That on the 13th day of March, 1972, the City Council of the City of Fort Worth adopted Ordinance No. 6644, which provided for the submission of two propositions to the electorate of the City of Fort Worth, the election to be held on April 11, 1972; and that such

propositions are set out in Stipulation No. 22 above (Section 6 of Ordinance No. 6644).

That Ordinance No. 6644 provided in Section 3 thereof for the holding of two separate but simultaneous elections, as follows:

"SECTION 3.

"That said election shall be held and conducted, in effect, as two separate but simultaneous elections, to wit: One election at which only the resident, qualified electors who own taxable property in the City and who have duly rendered the same for taxation shall be entitled to vote on said propositions, and another election at which all other resident, qualified electors of the City shall be entitled to vote on said propositions. The votes cast at each of said separate but simultaneous elections shall be recorded, returned and canvassed separately. It is hereby declared that the purpose of holding the election in such manner is to ascertain arithmetically:

(a) The aggregate votes cast at the election for and against said propositions by resident, qualified electors of the City; and also

(b) The aggregate votes cast at the election for and against said propositions by resident, qualified electors who own taxable property in the City and who have duly rendered the same for taxation.

Each elector shall be entitled to vote once on each of the propositions in accordance with the foregoing provisions of this ordinance.

"That the the above and foregoing dual election

procedure shall be followed unless a court of competent jurisdiction orders otherwise."

24. The Attorney General's policy in the approval of general obligation tax bonds since December 19, 1969, has been that each proposition must be approved by the property owning ad valorem taxpayers whose property has been duly rendered (as required by Article 6, §§ 3 and 3 (a) of the Texas Constitution) and each proposition must also receive the approval of the aggregate vote of property-owning ad valorem taxpayers whose property has been duly rendered and all other qualified electors (the test required by the Phoenix case).

This position was taken to insure that all general obligation tax bonds voted in Texas would be in full compliance with the Texas law and at the same time be protected in the event the Supreme Court of the United States subsequently holds the Texas voter qualification test for tax bond elections invalid. As a practical matter, until such time as the Texas law is tested in the Federal Courts, the municipal bonds of this State and its political subdivisions would be unmarketable without this protective procedure.

The Texas Supreme Court in Montgomery Independent School District v. Crawford Martin, Attorney General of Texas, 464 S.W. 2d 638 (1971), has spoken on the question of who shall vote in general obligation tax bond elections in Texas and it is incumbent upon the Attorney General of Texas to insure that the directives

of that Court are complied with in the approval of tax bonds. In those instances when tax bonds are not involved, the decisions of the United States Supreme Court in Kramer v. Union Free School District, 395 U.S. 621 (1969), and Cipriano v. City of Houma, 395 U.S. 701 (1969), are followed.

24A. If Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, were present in court, he would testify under oath that the requirement of rendition of property, personal and mixed, tangible and intangible, as a prerequisite to vote in a general obligation bond election is a matter of compelling necessity by reason of the plain and simple fact that no property is more susceptible of concealment than is personal and mixed, tangible and intangible property.

He would further testify, if he were present in court, that for the year 1970, the total personal property rendered for taxation in Texas amounted to $3,996,729,956.00 and for the year 1971 amounted to $4,261,631,147.00, which is an increase of 6.23%. This increase of $264,901,191.00 in personal property renditions for the year 1971 constitutes 11.59% of the overall increase in renditions of real, personal and mixed property over that rendered in 1970, which produces dollar-wise an additional $529,802.38 in revenues to the State. The total approximate revenues to the State as a result of ad valorem tax on personal property in the year 1971 amounted to approximately $8,523,262.30.

24B. If Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, were present in court, he would testify under oath that the requirement of rendition and disclosure of property for purposes of ad valorem taxation is of the utmost importance, that there is a compelling necessity for an effective system of tax assessment and collection, and that such a system is mandatory for the orderly creation of, payment of and discharge of tax bond obligations.

25. That the declared intent of the City Council of the City of Fort Worth with respect to the sale and issuance of the general obligation tax-supported bonds as declared in the adoption of Ordinance No. 6644 was as follows:

"SECTION 8.

"That in the event the tax-supported bonds are authorized at the special election hereby ordered, the City Council of the City of Fort Worth, Texas, may issue for sale any part or portion of said amounts at such time and times as in the judgment of the City Council it determines that a lawful interest and sinking fund may be provided for to take care of and discharge any part or portion of the bonds so issued for sale, it being the purpose of this section to make clear that the City Council of the City of Fort Worth, Texas, may not be required to issue the full amount of the series of the bonds as herein submitted but may issue for sale any portion of the same at such time and times as it determines advisable, under the authority hereby conferred after said election."

26. That assuming the requirements in Articles 5.03, 5.04 and 5.07 of the Texas Election Code and in Article 6, Sections 3 and 3a, of the Texas Constitution (which statutory and constitutional provisions all defendants have taken an oath "to support, protect and defend") did not exist, and assuming the policy of the Attorney General of Texas, as set forth in Stipulation No. 24 above, had never been announced and declared, then the City Council of the City of Fort Worth could exercise its independent legislative judgment and discretion and by ordinance would take such steps and procedures necessary to prepare for the issuance and sale of the Library Bonds submitted in Proposition No. 2 (Section 6 of Ordinance No. 6644).

27. That assuming the requirements in artilce 5.03, 5.04 and 5.07 of the Texas Election Code and in Article 6, Sections 3 and 3a, of the Texas Constitution (which statutory and constitutional provisions all defendants have taken an oath to "support, protect and defend") did not exist, and assuming the policy of the Attorney General of Texas as set forth in Stipulation No. 24 above had never been announced and declared, and assuming that the City Council of the City of Fort Worth determined it advisable, in the exercise of its independent legislative judgment and discretion, to take such steps and procedure necessary to prepare for the issuance and sale of the Library Bonds submitted in Proposition No. 2 (Section 6 of Ordinance No. 6644), then and in such event the defendant Mayor of the City of Fort Worth,

acting in his official capacity, would, as soon as possible and as soon as is consistent with orderly procedure and due care, inasmuch as Proposition No. 2 in the April 11, 1972, bond election received a majority of votes cast by all non-rendering and rendering voters of the City of Fort Worth, Texas, and before any of such bonds were offered for sale, cause to be forwarded to the Attorney General the bonds and a transcript thereof, together with a certified copy of the order or ordinance levying the tax to pay the interest and provide a sinking fund , and the statement of the total bonded indebtedness of the City, including the series of bonds proposed, together with the amount of the assessed value of the City for purposes of taxation as shown by the last official assessment of such City, and would also furnish the Attorney General with any additional information he might require.

28. That on April 17, 1972, the City Council of the City of Fort Worth, Texas, while in regular session, unanimously adopted the following motion:

> "Councilman Gandy made a motion, seconded by Councilman Briscoe, that the City Council go on record as stating that if the legal entanglements did not exist, the City would proceed to sell the library bonds voted April 11, 1972, to build a new central library, provided the other terms and conditions surrounding the sale of the bonds and construction bid procedures were reasonable and acceptable to the City Council, and when the motion was put to a vote by the Mayor, it prevailed unanimously."

29. That some time after the bond election held on April 11, 1972, defendant S.G. Johndroe, Jr., City Attorney of the City of Fort Worth, Texas, advised the City Council of said City "that the Attorney General has refused to certify bonds approved in identical circumstances, and it would be pointless to submit the Library Bonds (that is, the bonds submitted in Proposition No. 2) to the Attorney General," and he generally advised the City Council of the City of Fort Worth that it is just the same as if the issue had failed.

30. That assuming that the requirements in Articles 5.03, 5.04 and 5.07 of the Texas Election Code and in Article 6, Sections 3 and 3a, of the Texas Constitution (which statutory and constitutional provisions all defendants have taken an oath "to support, protect and defend") did not exist, and assuming that the policy of the Attorney General of Texas, as set forth in Stipulation No. 24 above, had never been announced and declared, and further assuming that the City Council of the City of Fort Worth had exercised its independent legislative judgment and discretion and had the City Attorney take such steps and procedure necessary for him to prepare for the issuance and sale of the Library Bonds submitted in Proposition No. 2 (Section 6 of Ordinance No. 6644), then and in that event the defendant City Attorney of the City of Fort Worth would prepare all instruments and documents necessary for the issuance and sale of the Library Bonds and endorse his approval thereon.

31. That on April 11, 1972, plaintiffs Michael L. Stone, Dorothy I. Ellis, Pat (Mrs. George A.) Crowley, James D. Henderson and Marjorie M. Watson were resident, qualified electors of the City of Fort Worth, the State of Texas, and the United States, and all of the plaintiffs remain such resident, qualified voters to this date.

32. That plaintiff Pat Crowley is one and the same person as "Mrs. George A. Crowley," who holds Tarrant County Voter Registration Certificate No. A-137229.

33. That all of the plaintiffs voted in the City of Fort Worth bond election held on April 11, 1972; that all of the plaintiffs cast ballots on both of the propositions submitted; and that all of the plaintiffs voted "for" (in favor of) the Library Bonds, Proposition No. 2.

34. That plaintiffs Michael L. Stone, Dorothy I. Ellis and James D. Henderson voted as qualified voters of the City of Fort Worth and not as rendering property owners, and that they voted "for" (in favor of) Proposition No. 2. (See Affidavit, Plaintiff's Exhibit E; also identified as Exhibit C in Plaintiffs' First Amended Complaint)

35. That plaintiffs Pat Crowley and Marjorie M. Watson voted in the City of Fort Worth bond election on April 11, 1972, as rendering property owners, and that they voted "for" (in favor of) Proposition No. 2. (See

Affidavit, Plaintiffs' Exhibit F; also identified as Exhibit D in Plaintiffs' First Amended Complaint)

36. That all of the above plaintiffs are fully competent to testify to the matters of fact contained in Stipulations Nos. 31 through 35, inclusive, and that each plaintiff has personal knowledge of that portion of such facts which pertain directly to him.

37. That if plaintiffs Michael L. Stone, Dorothy I. Ellis, Pat Crowley, James D. Henderson and Marjorie M. Watson were present in court, they would testify under oath to the matters of fact stipulated by the parties hereto in Stipulation Nos. 31 through 35, inclusive.

That the defendants stipulate that they have no evidence or testimony to present to this Court which would in any way contradict or impeach the truth of the matters of fact stated in Stipulations Nos. 31 through 35, inclusive.

38. That all of the bonds proposed to be issued under Proposition No. 2 (Library Bonds) would be general obligation, tax-supported bonds.

39. That the principal of and interest on general obligation, tax-supported bonds issued and sold by the City of Fort Worth to bona fide purchasers for value are paid solely from the revenues from taxes levied, assessed and collected by the City of Fort Worth from persons who own real, personal or mixed property which has been rendered for taxation.

40. That if defendant Roy A. Bateman were present in court, he would testify under oath that the requirement of rendition of property, personal and mixed, tangible and intangible property; and that the requirement necessity to local taxing authorities by reason of the plain and simple fact that no property is more susceptible of concealment than is personal and mixed, tangible and int intangible property; and that the requirement of voluntary rendition and disclosure of such property for purposes of ad valorem taxation is of the utmost importance and vitally necessary for an effective system of ad valorem tax assessment and collection and is directly and inextricably related to the creation of, payment and discharge of tax-supported bond obligations.

41. That if defendant Roy A. Bateman were present in court, he would testify under oath that the ad valorem tax is the life blood of local government financing and that the increasing burdens of local needs and inflation make ever increasing demands on local governments for additional tax revenues.

42. That if defendant Roy A. Bateman were present in court, he would testify under oath that the principal and interest on general obligation, tax-supported bonds

issued by the City of Fort Worth are, and will be, paid solely from the proceeds derived from taxes levied, assessed and collected from persons who own real, personal or mixed property which has been duly rendered for taxation; that the assessed valuation of real (including improvements), personal and mixed property in the City of Fort Worth for the fiscal year 1970-71 was $1,370,483,290; that of such assessed valuation, real property constituted $1,017,895.540, and personal and mixed property amounted to $352,587,750; that the assessed valuation of real (including improvements), personal and mixed property in the City of Fort Worth for the fiscal year 1971-72 was $1,444,024,440; and that of such assessed valuation, real property constituted $1,077,271,500 and personal and mixed property amounted to $366,752,240.

43. That if defendant Roy A. Bateman were present in court, he would testify under oath that for the year ending September 30, 1970, the City of Fort Worth derived $16,388,154 in taxes from real property rendered and placed on the assessment rolls and $5,676,669 from personal and mixed property rendered and placed on the assessment rolls; that for the year ending September 30, 1971, the City of Fort Worth derived $18,205,947.35 in taxes from real property rendered and placed on the assessment rolls and $6,198,138.73 from personal and mixed property rendered and placed on the assessment rolls; and that more than one-fourth of the total funds derived from

taxation in the City of Fort Worth for the years 1970-71 was derived from the taxation of personal and mixed property in said City.

44. That if defendant Roy A. Bateman were present in court, he would testify under oath that the fiscal year 1971-72 will require that from the funds derived from taxation, the sum of $7,364,524 must be allocated for principal and interest payments on general obligation tax bonds outstanding, which bonds are owned and held by bona fide purchasers for value throughout not only the entire United States but the world, and that the requirement of rendition of personal and mixed property, tangible and intangible, as a prerequisite to vote in a general obligation bond election is a matter of compelling necessity to the City of Fort Worth by reason of the plain and simple fact that no property is more susceptible of concealment than is personal and mixed, tangible and intangible property.

That as of December 31, 1971, the outstanding unpaid general obligation tax bond indebtedness of the City of Fort Worth was $92,852,000.

That the City Council of the City of Fort Worth must provide funds to meet its outstanding general obligation tax bond payments during the fiscal year 1971-72 in the amount of $7,364,524, and that in excess of $1,840,000 of such $7,364,524 must be obtained from taxes derived from the rendition of personal and mixed

property in the City of Fort Worth.

45. That the defendant Roy A. Bateman is fully competent to testify to the above matters of fact contained in Stipulations Nos. 40 through 44, inclusive, and as Treasurer of the City of Fort Worth, he has personal knowledge of such facts.

46. That plaintiffs stipulate that they have no evidence or testimony to present to this Court other than that contained in the foregoing stipulations which will in any way contradict or impeach the truth of the matters of fact stated in Stipulations Nos. 24, 24A, 24B, 40, 41, 42, 43, 44 and 45. That plaintiffs do not, however, stipulate that these reasons are sufficient to deny some resident, qualified voters of these taxing authorities the right to have their vote fully counted in bond elections, nor do they admit that these reasons satisfy the legal tests of Kramer v. Union Free School District, 395 U.S. 621, 89 S. Ct. 1886, 23 L. Ed. 2d 583 (1969), to the effect that restrictions on the right of otherwise qualified voters to vote (other than those of age, residence, etc.) must be necessary to promote a compelling State interest. 395 U.S. 621 at 627, 89 S. Ct. 1886 at 1890, 23 L.Ed.2d 583 at 589.

Furthermore, the plaintiffs object to any testimony that there is a compelling necessity for exclusion of non-property owners in this type of election on the grounds that such testimony is a conclusion of law on

the part of the witness and that such testimony invades the province of the Court in deciding questions of law.

47. On April 11, 1972, the City of Fort Worth in fact held a bond election submitting two propositions to the voters: Proposition Number I provided for approval or non-approval by the voters of bonds for a transportation system; Proposition Number II provided for approval or non-approval of bonds by the voters for library facilities. On April 11, 1972, the following votes were cast and recorded on Proposition Numbers I and II in such Fort Worth city bond election:

Owners of Property Rendered for Taxation		Non Renderers	Total
Proposition I			
For	13,466	4,094	17,560
Against	9,834	850	10,684
Proposition II			
For	10,849	3,758	14,607
Against	12,234	1,132	13,366

48. The defendant City of Fort Worth, with the appropriate approval by the defendant City Council members of the City of Fort Worth, the defendant Mayor R.M. Stovall, and the defendant City Attorney

S.G. Johndroe, Jr., has sold the Transportation System bonds approved by the voters of the City of Fort Worth in Proposition Number I in the April 11, 1972 bond election.

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 73-1723

JOHN L. HILL,
ATTORNEY GENERAL OF TEXAS,
Appellant

v.

MICHAEL L. STONE, ET AL,
Appellees

APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF TEXAS

APPEAL DOCKETED MAY 17, 1974
PROBABLE JURISDICTION NOTED
OCTOBER 15, 1974

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 73-1723

JOHN L. HILL,
ATTORNEY GENERAL OF TEXAS,

Appellant

v.

MICHAEL L. STONE, ET AL,

Appellees

APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF TEXAS

DOCKET ENTRIES

MICHAEL L. STONE, ET AL

V. CA-4-1975

R. M. STOVALL, ET AL

(Full title omitted in printing)

4-17-72	1 - COMPLAINT by Plaintiffs filed.
4-28-72	2 - PLAINTIFF'S FIRST AMENDED COMPLAINT, filed.
5-8-72	3 - ORIGINAL ANSWER of Defendants, R. M. Stovall, Mayor; S. G. Johndroe, Jr., City Attorney; Roy A. Bateman, City Secretary; Leonard E. Briscoe, Taylor Gandy, Jess M. Johnston, Jr., W. S. Kemble, Jr., John J. O'Neill, Ted C. Peters, Pat Reece and Mrs. Margret Rimmer, Council Members; and The City of Fort Worth, a Municipal Corporation, filed.
5-9-72	4 - ORIGINAL ANSWER of Defendant Crawford C. Martin, Attorney General of the State of Texas, filed.
5-10-72	5 - DESIGNATION AND COMPOSITION ORDER of the Three-Judge Court panel by John R. Brown, Chief Judge, Fifth Circuit, filed.

6-5-72	6 - ORDER SETTING PRELIMINARY PRE-TRIAL HEARING, filed.
11-8-72	7 - PRE-TRIAL ORDER, filed.
2-16-73	8 - TRIAL BRIEF for Plaintiffs, filed.
3-2-73	9 - TRIAL BRIEFS for all Defendants, filed.
3-19-74	10 - INTERVENOR'S MOTION FOR LEAVE TO INTERVENE ON THE GROUND OF COMMON QUESTION by the City of Corpus Christi, a Municipal Corporation, filed.
3-25-74	11 - ORDER OVERRULING MOTION TO INTERVENE, filed.
3-25-74	13 - MEMORANDUM OPINION by Thornberry, Circuit Judge; Woodward, District Judge, specially concurring; and Brewster, District Judge, concurring in result; filed.
3-25-74	14 - JUDGMENT by Judges Thornberry, Woodward, and Brewster, filed.
3-31-74	CLOSED, JS-6 CARD mailed.
4-3-74	15 - MOTION TO MODIFY JUDGMENT AND/OR FOR PARTIAL STAY by all Defendants, filed.

4-5-74	12 - REPLY TO DEFENDANTS' MOTION TO MODIFY JUDGMENT by Plaintiffs, filed.
4-9-74	16 - ORDER denying Defendants' MOTION TO MODIFY JUDGMENT AND/OR FOR PARTIAL STAY by Judges Thornberry and Woodward, filed.
4-17-74	17 - NOTICE OF APPEAL by all Defendants except Attorney General of Texas, filed.
4-18-74	18 - NOTICE OF APPEAL by John L. Hill, Attorney General of Texas, filed.
4-15-74	APPLICATION FOR A PARTIAL STAY OF A JUDGMENT OF A THREE-JUDGE DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS by Petitioner in John L. Hill, Attorney General of Texas v. Michael L. Stone, et al., Application A-986, filed in SUPREME COURT.
4-17-74	OPPOSITION TO APPELLANT'S APPLICATION FOR PARTIAL STAY OF MANDATE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH DIVISION by Respondents, Michael L. Stone, et al., filed in SUPREME COURT.

4-25-74	ORDER granting application for partial stay by SUPREME COURT, filed.
5-17-74	APPEAL DOCKETED in SUPREME COURT as HILL V. STONE, ET AL., NO. 73-1723.
10-15-74	ORDER noting PROBABLE JURISDICTION in SUPREME COURT, filed.

NOTATIONS

The following items appear in an appendix to the Jurisdictional Statement at the page noted and are not reprinted in this appendix:

Judgment of the lower court 1a

Memorandum Opinions of the lower court 5a

Notice of Appeal of Defendant Attorney General of Texas 1b

Full text of:

- Tex. Const. Art. VI, Section 3 (1955) 1c
- Tex. Const. Art. VI, Section 3a (1955) 1c
- Tex. Election Code Ann. Art. 5.03 (Supp. 1973) 2c
- Tex. Election Code Ann. Art. 5.04(a) (Supp. 1973) 3c
- Tex. Election Code Ann. Art. 5.07 (1967) 3c
- Charter of the City of Fort Worth, Ch. 25, § 19. . . . . 4c

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

MICHAEL L. STONE ET AL.,		
Plaintiffs,		NO.
VS.		CA-4-1975
CITY OF FORT WORTH ET AL.,		
Defendants.		

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES OF THE CITY OF FORT WORTH; R. M. STOVALL, ITS MAYOR; S. G. JOHNDROE, JR., ITS CITY ATTORNEY; ROY A BATEMAN, ITS CITY SECRETARY; AND THE MEMBERS OF THE CITY COUNCIL THEREOF

Notice is hereby given that the City of Fort Worth; R. M. Stovall, its Mayor; S. G. Johndroe, Jr., its City Attorney; Roy Bateman, its City Secretary; and the Members of the

City Council thereof, defendants in the above numbered and styled cause, hereby appeal to the Supreme Court of the United States from the final Judgment rendered and entered herein on the 25th day of March, 1974.

This appeal is taken pursuant to 28 USC, § 1253.

Respectfully submitted,

S. G. JOHNDROE, JR.
City Attorney of the City
of Fort Worth
1000 Throckmorton Street
Fort Worth, Texas 76102

Attorney for the Above
Named Defendants

(Affidavit of service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MICHAEL L. STONE, ET AL. |

VS. | CA-4-1975

R. M. STOVALL ET AL. |

PRE-TRIAL ORDER

A pre-trial conference was held in the above entitled and numbered cause before the Hon. Leo Brewster, Resident Judge, on the 8th day of November, 1972. Don Gladden and Marvin Collins appeared as counsel for plaintiffs; S. G. Johndroe, Jr., City Attorney, appeared as counsel for defendants, R. M. Stovall, Mayor; S. G. Johndroe, Jr., City Attorney; Roy A. Bateman, City Secretary; the City of Fort Worth; and its City Council members; and Robert B. Davis, Assistant Attorney General of the State of Texas,

appeared as counsel for defendant, Crawford Martin.

1.

JURISDICTIONAL QUESTIONS

No jurisdictional questions are raised by defendants other than those connected with their respective claims that plaintiffs have failed to state a claim upon which relief can be granted.

2.

PENDING MOTIONS AND
QUESTIONS RAISED THEREIN

Each of the respective defendants has filed or adopted motions to render judgment on the pleadings and to dismiss Plaintiffs' First Amended Complaint.

3.

PLAINTIFFS' CLAIMS

I. Factual Claims

(a) CLASS ACTION

The plaintiffs are members of a class of natural persons in the City of Fort Worth who voted

in the City of Fort Worth bond election of April 11, 1972, against whom the defendant, City of Fort Worth and defendants city officials of the City of Fort Worth have unconstitutionally discriminated, against whom the defendant City of Fort Worth and the defendants city officials of the City of Fort Worth have threatened to, and are about to, unconstitutionally discriminate, and against whom the defendant Attorney General has threatened to, and is about to, unconstitutionally discriminate. The unconstitutional discrimination just complained of consists of the enforcement of the provisions of the Constitution and Statutes of the State of Texas, and a portion of the Fort Worth City Charter, all of which require ownership of property which has been rendered for taxation as a prerequisite to the right of qualified voters to vote in non-federal bond elections, as hereinafter more fully appears.

This class of Fort Worth citizens is so numerous that it is impractical to join all of them in one action. There are questions of law common to all of the members of the class, to-wit: the application of Article 6 §§ 3 and 3a of the Texas Constitution, Articles 5.03, 5.04, and 5.07 of the Texas Election Code, and a portion of Chapter 25, § 19 of the Fort Worth City Charter, and the application of a system of dual balloting originally conceived by the Attorney General of the State of Texas, and applied in the Fort Worth city bond election held on April 11, 1972. There are questions of fact common to all members of the class, since the discrimination of which plaintiffs complain took place during or arises or will arise out of, the Fort Worth city bond election held on April 11, 1972. The claims of the parties plaintiff to this action are typical

of the claims of the class in that the members of the class are seeking to have their votes counted equally with the votes of other, more privileged voters who were permitted to vote in the Fort Worth city bond election of April 11, 1972. The parties plaintiff in this action will fairly and adequately protect the interests of the class as a whole. The prosecution of separate actions by individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members of the class not parties to this adjudication. The defendants have acted, refused to act, threatened to act, threatened to refuse to act, and are about to act and about to refuse to act, on grounds generally applicable to the plaintiffs'

class, to-wit: the defendants have refused, threatened to refuse, and are about to refuse to sell, certify, approve, or otherwise ratify Proposition Number II which was submitted to the qualified voters of the City of Fort Worth in a bond election held on April 11, 1972, in which a majority of the qualified voters of the City of Fort Worth voted for Proposition Number II. The defendants have refused, threatened to refuse, and are about to refuse to so sell, certify, and approve and otherwise ratify these bonds for the reason that a majority of the persons who voted in that election as property owners voted against Proposition Number II, such refusal and threatened refusal being made by the defendants on the basis that Article 6 §§ 3 and 3a of the Texas Constitution, Articles 5.03, 5.04 and 5.07 of the Texas Election Code,

and a portion of Chapter 25 § 19 of the Fort Worth City Charter, require a majority of persons voting as property owners to vote in favor of the proposition, as a prerequisite to such selling or approval, or both such selling and approval. Furthermore, the questions of law and fact common to the members of the class dominate over any other questions which affect only individual members.

(b) That the existence of Article 6, Sections 3 and 3a, of the Texas Constitution (1955), Articles 5.03 and 5.04 of the Texas Election Code Ann. (Supp. 1969), and Article 5.07 of the Texas Election Code Ann. (1967) tends to chill the free exercise of the franchise in bond elections. On their face, these provisions are a threat to the free exercise of the franchise in non-federal elections.

(c) That the classification of voters by Article 6, Sections 3 and 3a, of the Texas Constitution (1955) and Articles 5.03 and 5.04 of the Texas Election Code Ann. (Supp. 1969) and Article 5.07 of the Texas Election Code Ann. (1967) is not necessary to promote any conceivable compelling state interest.

II. Plaintiffs' Legal Claims

(i) Preliminary

(a) Jurisdiction is conferred on this Court by 42 U.S.C. § 1983, and 28 U.S.C. § 1343 (3).

(b) That this case is a proper class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

(c) That this case is a proper one for a declaratory judgment pursuant to 28 U.S.C., Sections 2201 and 2202.

(d) That this case is a proper one for a three-judge court pursuant to 28 U. S. C., Sections 2281 and 2284.

(e) Thus there is plainly no adequate administrative remedy for the plaintiffs and they therefore need not exhaust or attempt to exhause any further administrative remedies.

(f) That the damage and injury which has been done and is about to be done to plaintiffs by reason of the constitutional and statutory provisions challenged herein is such that there is no adequate remedy at law.

(ii) Merits

(a) That Article 6, Sections 3 and 3a of the Texas Constitution (1955), Articles 5.03 and 5.04 of the Texas Election Code Ann. (Supp. 1969), and Article 5.07 of the Texas Election Code Ann. (1967) are unconstitutional, since

they violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States of America.

(b) Plaintiffs Michael L. Stone, Dorothy I. Ellis, and James D. Henderson have been aggrieved and will be aggrieved by the attacked Texas provisions and Fort Worth City Charter provisions as follows:

They voted for (in favor of) Proposition Number II which was passed by a majority of qualified voters for the City of Fort Worth but which was disapproved by the persons voting as property owners. These plaintiffs, as persons who have not rendered property for taxation, have been discriminated against, since their votes were not given equal weight by the defendants compared to the votes of the property owners. They have thus been denied equal protection of

the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

(c) Plaintiffs Pat Crowley and Marjorie M. Watson, as rendering property owners, voted for (in favor of) Proposition Number II which, though it received a majority of the votes cast in the aggregate of all of the qualified voters of the City of Fort Worth, was defeated in the rendering property owners tabulation. As members of the general class of persons who voted for (in favor of) Proposition Number II, their votes have been denied equal weight with the votes of the rendering property owners who voted against Proposition Number II. This is so, since all rendering property owners who voted against Proposition Number II were given a veto power over all other voters voting in the April 11, 1972 election. Their constitutional rights to

equal protections of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States have thus been violated.

All of the plaintiffs are unwilling to have their right to vote, or their right to have their vote counted, based upon wealth, property ownership of any kind, or rendition of property for taxation. As citizens of Fort Worth and of the United States these plaintiffs and 14,602 others like them have a right to more than a practice vote in a bond election. The children of these plaintiffs and the children of many of the other 14,602 persons similarly situated have just as much need for an adequate library as do the children of the more fortunate property owners. Unless it is right, constitutionally, for the wealthy citizens of Fort Worth to rule and the poor citizens of Fort Worth to be ruled

by them, all of these plaintiffs were denied equal protection of the law.

(d) That this case is properly one for injunctive relief.

III. Relief Requested

(i) Preliminary

That a three-judge court be convened to hear this cause.

(ii) Declaratory

The plaintiffs respectfully request the Court to declare Article 6, Sections 3 and 3a of the Texas Constitution, Articles 5.03, 5.04, and 5.07 of the Texas Election Code, and that portion of Section 19 of Chapter 25 of the City Charter of the City of Fort Worth which provides "Provided, that no bonds shall be issued, or bonded debt created, unless authority therefor shall first be submitted to the qualified voters

who pay taxes on property situated within the corporate limits of the City of Fort Worth; and, if a majority of the votes cast at such election are in favor of the issuance of such bonds, then such issue shall be made; but, should the majority of the votes cast at said election be against the proposition, then such bonds shall not be issued." to be in irreconcilable conflict with the Fourteenth Amendment to the United States Constitution and hence unconstitutional and void.

(iii) Injunctive

(a) The plaintiffs respectfully request this Court to direct the defendants, S. G. Johndroe, the City Attorney, and his successors in office, the defendant City Council members and their successors in office, and the defendant City of Fort Worth to not consider the fact that a majority of property owners whose property

had been rendered for tax purposes voted against Proposition Number II in deciding whether or not to sell, issue, certify or otherwise approve the bonds submitted to the voters of the City of Fort Worth in the April 11, 1972 bond election, but rather that they consider without differentiation, the aggregate vote cast and tabulated by all persons casting ballots.

(b) The plaintiffs respectfully request the Court to direct the Attorney General of Texas and his successors in office to not consider the fact that a majority of property owners voted against Proposition Number II in deciding whether or not to sell, issue, certify or otherwise approve the bonds submitted to the voters of the City of Fort Worth in the April 11, 1972 bond election, but rather that he consider, so far as the number of votes cast and tabulated, the fact

that a majority of resident qualified voters of the City of Fort Worth voted for (in favor of) Proposition Number II in reaching such a decision.

(c) The plaintiffs respectfully request that this Court enjoin all of the defendants and their successors in office from considering or giving any force or effect to Article 6, Sections 3 and 3a of the Texas Constitution, Articles 5.03, 5.04, and 5.07 of the Texas Election Code, and that portion of Section 19 of Chapter 25 of the City of Fort Worth's Charter set forth in number (ii) above, in connection with the votes cast by the citizens of Fort Worth, Texas, in the April 11, 1972 bond election of the City of Fort Worth.

(d) The plaintiffs respectfully request this Court to enjoin all the defendants and their successors in office from giving any effect or

force in the future to Article 6, Sections 3 and 3a of the Texas Constitution, Articles 5.03, 5.04, and 5.07 of the Texas Election Code, and that portion of Section 19 of Chapter 25 of the Fort Worth City Charter set forth in number (ii) above, including segregating ballots.

(e) That all defendants be enjoined from giving any force, effect or validity to Article 6, Sections 3 and 3a, of the Texas Constitution (1955), Articles 5.03 and 5.04 of the Texas Election Code Ann. (Supp. 1969), and Article 5.07 of the Texas Election Code Ann. (1967), in any future bond election.

4.

DEFENDANTS' CLAIMS

A. Claims of Defendants, R. M. Stovall, Mayor; S. G. Johndroe, Jr., City Attorney; Roy A. Bateman, City Secretary;

Leonard E. Briscoe, Taylor Gandy, Jess M. Johnston, Jr., W. S. Kemble, Jr., John J. O'Neill, Ted C. Peters, Pat Reece and Mrs. Margret Rimmer, Council Members; and the City of Fort Worth, a Municipal Corporation

(1) That the plaintiffs have wholly failed to state a claim upon which relief can be granted and these defendants seek judgment on the pleadings dismissing the Complaint.

(2) That there are no facts pleaded or present showing that plaintiffs have been unconstitutionally discriminated against or that these defendants have threatened to, or are about to, unconstitutionally discriminate against plaintiffs.

(3) That there are no facts pleaded or present showing that plaintiffs exist as a class; that there are no facts pleaded or present showing or even remotely indicating that any class exists,

or that any class is so numerous that joinder of all members is impracticable; that there are no facts pleaded or present showing that there are questions of law or fact common to any class; and that there are no facts pleaded or present showing that there are claims of any party plaintiff which are typical of any class or that plaintiffs are representative parties who are in a position to fairly and adequately protect the interests of any purported class.

(4) That there are no facts pleaded or present showing that these defendants have acted in any manner injurious to the rights of any class or that a class action is superior to other available methods for the fair and efficient adjudication of any purported controversy.

(5) That the law of this State with respect to Article 6, Sections 3 and 3a, of the

Texas Constitution and Articles 5.03, 5.04 and 5.07 of the Texas Election Code is expressed in Montgomery Independent School District v. Crawford Martin, Attorney General of Texas, 464 S. W. 2d 638 (Tex. 1971), wherein the Supreme Court of Texas upheld the validity of Article 6, Section 3a, when challenged on the ground that it violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

(6) That each of the defendants has taken an oath or affirmed that he will support, protect and defend the Constitution and laws of the State of Texas.

(7) That there are no facts pleaded or present showing or even remotely indicating that plaintiffs have been discriminated against in any manner nor that these defendants have deprived

plaintiffs of any of their rights, privileges or immunities guaranteed by the Fourteenth Amendment.

(8) That it is a realistic matter of compelling necessity in general obligation tax bond capital improvement financing that all property, of whatsoever kind or character, real, personal or mixed, be rendered and placed on the tax rolls of the City of Fort Worth; that Proposition No. II asks the voters "if the City Council of the City of Fort Worth should be authorized to issue its negotiable coupon bonds in the principal sum of Six Million, Eight Hundred and Sixty Thousand Dollars ($6,860,000) for the purpose of making permanent city improvements by constructing, building, improving and equipping buildings for the Public Library System of the City of Fort Worth," and further asks the voters

to authorize the

> "levy (of) a sufficient tax to pay the interest on said bonds and create a sinking fund sufficient to redeem said bonds at the maturity thereof.";

That Article 7145 of the Revised Civil Statutes of the State of Texas provides that

> "All property, real, personal or mixed, *** is subject to taxation, and the same shall be rendered and listed as herein prescribed.";

and that Article 7145 was adopted by the Legislature pursuant to the provisions of Article 8, Section 1, of the Constitution of the State of Texas, which provides in part:

> "All property in this State, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value ***."

That Article 7152 of the Revised Civil Statutes speaks to the manner in which all prop-

erty shall be listed or rendered and provides as follows:

"Art. 7152. How rendered

All property shall be listed or rendered in the manner following:

(1) By the owner. Every person of full age and sound mind, being a resident of this State, shall list all of his real estate, moneys, credits, bonds or stock of joint stock or other companies (when the property of such company is not assessed in this State), moneys loaned or invested, annuities, franchises, royalties, and all other property.

(2) As Agent. He shall also list all lands or other real estate, moneys and other personal property invested, loaned or otherwise controlled by his as agent or attorney, or on account of any other person, company, or corporation, whatsoever, and all moneys deposited subject to his order, check, or drafts and credits due from or owing by any person, body corporate or politic.

(3) Minor. The property of

a minor child shall be listed by his guardian, or by the person having such property in charge.

(4) Separate property of married person. The separate property of each spouse shall be rendered by the owner thereof, but the husband or wife of the owner may act as agent of the owner in such rendition.

(5) Idiot. The property of any idiot or lunatic, by the person having charge of such property.

(6) Cestui que trust. The property of a person for whose benefit it is held in trust by the trustee of the estate; of a deceased person, by the executor or administrator.

(7) Receivers. The property of corporations whose assets are in the hands of receivers, by such receivers.

(8) Corporations. The property of a body politic or corporate, by the president or proper agent or officer thereof.

(9) Copartnership. The property of a firm or company,

by a partner or agent thereof.

(10) Manufactories. The property of manufacturers and others in the hands of an agent, by such agent, in the name of his principal, as real, personal and merchandise."

That under Article 8, Section 1, of the Constitution of the State of Texas it is required that

"Taxation shall be equal and uniform.";

and that as a matter of law, to permit a wilful non-renderer to impose a tax lien on a renderer's property without being required to assume a commensurate burden himself would be, in effect, to deprive the renderer of property without due process of law.

(9) That the principal of and interest on general obligation tax-supported bonds issued by the City of Fort Worth are and will be paid

solely from the proceeds derived from taxes levied, assessed and collected from persons who have rendered and on the tax rolls real, personal or mixed property; and that the requirement of rendition and disclosure of property for the purposes of ad valorem taxation is of the utmost importance, is a compelling necessity for an effective system of tax assessment and collection, and is inextricably related to the creation of, payment and discharge of tax bond obligations.

That the assessed valuation of real (including improvements), personal and mixed property rendered for taxation in the City of Fort Worth for the fiscal year 1970-71 was $1,370,483,290, and of such assessed valuation, real property constituted $1,017,895,540 and personal and mixed property amounted to $352,587,750; and that the assessed valuation of

real (including improvements), personal and mixed property in the City of Fort Worth for the fiscal year 1971-72 was $1,444,024,440, and of such assessed valuation, real property constituted $1,077,271,500 and personal and mixed property amounted to $366,752,240.

That for the year ending September 30, 1970, the City of Fort Worth derived $16,388,154 in taxes from real property rendered and placed on the assessment rolls and $5,676,669 from personal and mixed property rendered and placed on the assessment rolls; that for the year ending September 30, 1971, the City of Fort Worth derived $18,205,947.35 in taxes from real property rendered and placed on the assessment rolls and $6,198,138.73 from personal and mixed property rendered and placed on the assessment rolls; and that more than one-fourth of the total funds

derived from taxation in the City of Fort Worth in each of said fiscal years was derived from the taxation of personal and mixed property in said city.

That the fiscal year 1971-72 required that from the funds derived from taxation, the sum of $7,364,524 be expended for principal and interest payments on general obligation tax bonds outstanding, which bonds are owned and held by bona fide purchasers for value throughout not only the entire United States but the world, and that the requirement of rendition of property, real or personal and mixed, tangible and intangible, as a prerequisite to vote in a general obligation tax-levy bond election is a matter of compelling necessity to the City of Fort Worth by reason of the plain and simple fact that no property is more susceptible of

concealment then is personal and mixed, tangible and intangible, and further by reason of the fact that all citizens have a duty and obligation to render their property for taxation.

That as of December 31, 1971, the outstanding unpaid general obligation tax levy bond indebtedness of the City of Fort Worth was $92,852,000; that the defendant City Council of the City of Fort Worth as a matter of compelling necessity was required to meet its general obligation tax-levy bond payments during the fiscal year 1971-72 in the amount of $7,364,524; and that in excess of $1,840,000 of such $7,364,524 had to be obtained from taxes derived from the rendition of personal and mixed property in the City of Fort Worth.

B. Claims of Defendant, Crawford Martin, and Additional Relief Requested

(1) Defendant Crawford Martin adopts the claims of defendants, R. M. Stovall, Mayor; S. G. Johndroe, Jr., City Attorney; Roy A. Bateman, City Secretary; Leonard E. Briscoe, Taylor Gandy, Jess M. Johnston, Jr., W. S. Kemble, Jr., John J. O'Neill, Ted C. Peters, Pat Reece and Mrs. Margret Rimmer, Council Members; and the City of Fort Worth, a municipal corporation.

(2) One of the functions of the Office of the Attorney General, by statute, is to certify to the legality of proceedings underlying the issue of any proposed municipal bonds and the issuance of an opinion as to such legality prior to their registration by the Comptroller of Public Accounts of the State of Texas. (Art. 4398 R. C. S., Art. 709 R. C. S.)

(3) The position of the Attorney General's

Office is that the holding of the Texas Supreme Court in Montgomery Independent School District v. Crawford Martin, Attorney General of Texas, 464 S. W. 2d 638 (1971), is in complete accord with the provisions of the United States Constitution and should be so confirmed by this Court.

(4) The Attorney General positively asserts the validity of the Constitution of the State of Texas generally, and in particular the validity of Article VI, Sections 3 and 3(a) thereof, as being reflective of the will of the total electorate of this State who participated at the polls in the adoption of those provisos. The Attorney General further claims that those provisos of the Texas Election Code in question (Articles 5.03, 5.04 and 5.07) are valid by virtue of their adoption by the duly elected representatives of the total electorate of the

State of Texas.

(5) The State of Texas has a compelling interest in the maximum collection of all available ad valorem tax revenue for the support of its public improvements and those of its political subdivisions. The requirement of property rendition as prerequisite to voting in elections on propositions to issue bonds, expend money, assume debt or otherwise lend credit is the only practical method available to encourage those property owners who have failed in their legal duty to render and participate in the tax burden of the cost of public improvements, as specifically required by V. A. T. S., Articles 7145 and 7152.

(6) Irrespective of the Court's decision regarding the validity of the Texas constitutional and statutory provisions here in issue, the Attorney General prays that any decision of the

Court be made prospective in its application. A decision that the City of Fort Worth's bond election of April 11, 1972, was invalid, raises the inescapable implication that all Texas bond elections held in the same manner are invalid, thereby endangering the millions of dollars of outstanding tax bond obligations of the State and its political subdivisions by subjecting them to the possibility of taxpayers' suits enjoining the collection of taxes to pay such obligations, on the theory that the elections whereby they were authorized are void.

(7) The Attorney General further prays that no injunctive relief be granted to plaintiffs in this suit pending a final judgment upon the possible appeal of this case. In the event this Court should see fit to grant plaintiffs' requested injunctive relief, thereby enjoining the Attorney

General from giving further consideration to the provisions of Article VI, Sections 3 and 3(a), of the Texas Constitution, as well as Articles 5.03, 5.04 and 5.07 of the Texas Election Code in his examination of bonds offered for sale, the financing of tax supported public improvements in Texas will come to a standstill pending the appeal of this case to final judgment. As a practical matter, municipal bonds of this State and its political subdivisions will be unmarketable during the pendency of such an appeal. Plaintiffs' prayer that the Attorney General be enjoined from considering or giving any force or effect to Article VI, Sections 3 and 3(a), as well as Articles 5.03, 5.04 and 5.07 of the Texas Election Code, will be meaningless, in that neither investors nor recognized bond counsel, whose legal opinions as to validity are a market require-

ment, will be willing to have anything to do with bonds voted in any other manner, pending the appeal and a final judgment in this case.

5.

FACTS ESTABLISHED BY STIPULATION

1. That the defendant City of Fort Worth is a municipal corporation located in Tarrant County, Texas, and duly organized and existing under the Constitution and laws of the State of Texas and by home-rule Charter duly adopted by its electorate in December of 1924 under the provisions of Article XI, Section 5, of the Constitution of the State of Texas.

2. That at the time of the filing of this suit, defendant Crawford Martin was the duly elected Attorney General of the State of Texas.

3. That defendant S. G. Johndroe, Jr., is the duly appointed City Attorney of the City of Fort Worth.

4. That at the time of the filing of this suit and at the present time R. M. Stovall is the duly elected Mayor of the City of Fort Worth.

5. That the defendant Roy A. Bateman is the duly appointed City Secretary-Treasurer of the City of Fort Worth.

6. That at the time of the filing of this suit and at the present time the defendants, Leonard E. Briscoe, Taylor Gandy, Jess M. Johnston, Jr., W. S. Kemble, Jr., John J. O'Neill, Ted C. Peters, Pat Reece and Mrs. Margret Rimmer, are the duly elected members of the City Council of the City of Fort Worth.

7. That Plaintiffs' Exhibit "A" is a true and correct copy of the Charter of the City of Fort Worth, as amended.

8. That Chapter VI of the Charter of the City of Fort Worth provides for certain duties and responsibilities of the defendant S. G. Johndroe, Jr., as City Attorney, and reads as follows:

"DEPARTMENT OF LAW

"Section 1. In addition to the departments created and placed under the immediate control of the City Manager, there is hereby created another department, to be known as the Department of Law. The Director or head of this department shall be a competent practicing lawyer, of recognized ability, residing in the City, whose appointment shall be recommended by the Manager and approved by the Council. He shall serve for a period of two years from the date of his appointment, unless sooner discharged by the Council, either upon its own motion or upon the recommendation of the Manager, on account of his services not proving satisfactory; and of this matter the Council shall be the sole judge, and

their decision with respect thereto shall be final.

"Section 2. The Director of the Department of Law shall be known as the City Attorney, and shall have power to appoint such assistants as may be deemed necessary by him, subject to the approval of the Manager and the Council; such assistants to serve in the capacity as long as their services are satisfactory to the Council and the City Manager. The City Attorney and his assistants shall receive such compensation as may be fixed by resolution of the Council.

"Section 3. Duties of the City Attorney. -- He shall be the legal adviser of and attorney and counsel for the City and for all officers and departments thereof, in all matters relating to their official duties. He shall prosecute or defend all suits for and on behalf of the City in all the courts, and shall prepare all contracts, bonds and other instruments in writing in which the city is concerned, and shall endorse on each his approval as to the

for and legality thereof. No such bond, contract or instrument shall become effective without such endorsement by the City Attorney thereon.

"Section 4. He shall attend all sessions of the Council and make diligent investigation and report to the Council, or to the City Manager, or any director of departments, his opinion with respect to any legal matter submitted to him by any of them. He shall, either in person or by an assistant, act as Prosecuting Attorney in the Corporation Court. He shall prosecute all cases brought before such court and perform the same duties, as far as they are applicable thereto, as are required of the Prosecuting Attorney of the County. He shall maintain his office in the City Hall, in such place as may be provided by the Council, and shall freely confer with and advise the City Manager on all matters that may be referred to him by the City Manager. He shall prepare in correct legal form all ordinances passed by the Council.

"Section 5. The City

Attorney shall apply in the name of the City to a court of competent jurisdiction for an order of injunction to restrain any misapplication of the funds of the City, or the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the City in contravention of law, or which was procured by fraud or corruption.

"Section 6. When an obligation or contract made on behalf of the City granting a right or easement, or creating a public duty, is being evaded or violated, the City Attorney shall likewise apply for the forfeiture or the specific performance thereof, or for such relief as the nature of the case may require.

"Section 7. In case any officer or commission shall fail to perform any duty required by law, the City Attorney shall apply to a court of competent jurisdiction for a writ of mandamus to compel the performance of such duty.

"Section 8. Taxpayers' Suits. -- In case the City Attorney, upon written request of three taxpayers of the City, fails to make any application provided for in any of the preceding three sections, such taxpayers may institute suit or proceedings for such purpose, in their own names, on behalf of the City; but no such suit or proceeding shall be entertained by any court until such request shall have been first made to the City Attorney, nor until the said taxpayers shall have given security for the costs of the proceedings.

"Section 9. The City Attorney and his assistants shall be responsible for the proper and efficient handling of the entire legal affairs, suits, pleas and litigation in which the City is interested. No extra counsel shall be employed to assist the City Attorney, save and except in cases of extraordinary importance and emergency, and then only on the written recommendation of the City Manager showing the necessity and importance of employing such additional legal assistance,

approved and adopted by the Council. In such contingency, the Council shall fix in advance, as far as practicable, the compensation to be allowed such extra counsel by resolution spread upon the minutes."

9. That Plaintiffs' Exhibit "B" (also identified as Exhibit I in Plaintiffs' First Amended Complaint) is a true and correct copy of Ordinance No. 6644, which ordinance was the ordinance calling the bond election held on the 11th day of April, 1972.

10. That Section 19 of Chapter XXV of the Charter of the City of Fort Worth reads as follows:

"Section 19. Issuance and Sale of Bonds. -- The City Council shall have authority to provide for the issuance and sale of bonds for permanent improvements and for any other legitimate municipal purpose as may be determined by the City Council; but no bonds shall be issued to fund any overdraft or indebtedness incurred

for current expenses of the city government, or any subdivision thereof. The City Council shall also have the right to fund any maturing bonds by the issuance of new bonds in lieu thereof at the same or a lower rate of interest. No bonds shall be issued or refunded that bear a greater rate of interest than five per cent per annum, and the same shall never be sold for less than par and accrued interest, and all bonds shall express upon their face the purpose or purposes for which they are issued.

"No bonds shall be issued unless authorized by ordinance, which ordinance shall provide an adequate fund from the taxes for the payment of the annual interest and sinking fund of not less than two per cent per annum for the ultimate redemption of such bond issue, and such ordinance shall become effective without the necessity of publication. Provided, that no bonds shall be issued, nor bonded debt created, unless authority therefor shall first be submitted to the qualified voters who pay taxes on property situated within the corporate limits of the City of Fort Worth; and, if a majority

of the votes cast at such election are in favor of the issuance of such bonds, then such issue shall be made; but, should the majority of the votes cast at said election be against the proposition, then such bonds shall not be issued. The City Council shall have full power and authority to prescribe the way and manner in which such election shall be held, the notice to be given therefor, the polling places in the various parts of the City at which the election is to be held, prescribe the form of ballot and the other details of said election, independently of the general election laws of the State of Texas. But this requirement as to submitting the question of the issuance of bonds to a vote of the people before the same can be authorized shall not apply to the refunding of bonds heretofore issued, where the same can be refunded at the same or a lower rate of interest, if in the judgment of the City Council the said bonds cannot be retired, either in whole or in part, at maturity. The said bonds when issued shall be submitted to and approved by the Attorney General of the State of Texas, as required by the statutes of this State, before being offered for sale in the

market."

11. That Section 29 of Chapter XXVIII of the Charter of the City of Fort Worth reads in part as follows:

> "Section 29. Elections -- Council to Provide for Holding Same -- Counting Returns and Declaring Result. -- The City Council shall make all necessary regulations concerning elections, the manner and method of holding same, by proper ordinances enacted for that purpose. Such regulations, however, shall be in keeping with the provisions of this Charter and shall be in keeping and consistent with the provisions of the State law applicable to elections in municipalities, insofar as the same may be practicable. ***"

That Section 30 of Chapter XXVIII of the Charter of the City of Fort Worth reads as follows:

> "Section 30. Oath of Office. -- Every officer of the City shall, before entering upon the duties of his office, take and subscribe to an oath or affirmation, to be filed and kept in the office of the City Secretary, that he will support, protect and defend the Constitution and laws of the United States and of the State of Texas, and in all respects faithfully discharge the duties of his office or position. This provision shall apply to the City Manager and to the heads of departments."

12. That Article 709 of the Revised Civil Statutes of the State of Texas provides in part that

> "Before any bonds shall be offered for sale, *** the mayor *** shall forward the bonds to the Attorney General, together with a certified copy of the order or ordinance levying the tax to pay the interest and provide a sinking fund, and a statement of the total bonded indebtedness of the *** city ***, including the series of bonds proposed, together with the amount of the assessed value of the *** city *** for purposes of taxation as shown by the last official assessment of such *** city ***. Such

*** mayor shall also furnish the Attorney General with any additional information he may require."

13. That Article 709d of the Revised Civil Statutes of the State of Texas provides in part that

> "When *** the bonds of any incorporated city *** are offered for sale, the party offering, or proposing to sell, such bonds, obligations, and pledges shall first submit them to the Attorney General, who shall carefully inspect and examine the same in connection with the law under which they were issued, and shall diligently inquire into the facts and circumstances so far as may be necessary to determine the validity thereof; and, upon being satisfied that such bonds, obligations, and pledges were issued in conformity with law, and that they are valid and binding obligations, he shall thereupon certify to their validity, and his certificate to that effect, so procured by the party offering such bonds, obligations, and pledges as the case may be, shall be submitted to the Comptroller *** with the bonds,

> obligations, and pledges so offered for sale, and shall be carefully preserved by the Comptroller. ***"

14. That the Attorney General of Texas has duties which include the certification of the legality of proceedings underlying the issuance of any proposed municipal bonds and the issuance of an opinion as to such legality prior to their registration by the Comptroller of Public Accounts of the State of Texas.

15. That Article 4398 of the Revised Civil Statutes of the State of Texas provides as follows:

> "ATTORNEY GENERAL
> * * *
> "Art. 4398. To examine bonds
>
> He shall carefully examine all county and municipal bonds sent to him as provided by Article 709, in connection with the facts and the Constitution and laws on the subject of the execution of such

bonds, and if, as the result of such examination, he shall find that such bonds were issued in conformity with the Constitution and laws, and that they are valid and binding obligations upon the county, city, or town, by which they are executed, he shall so officially certify."

16. That prior to the holding of the election of April 11, 1972, the defendant City Secretary of the City of Fort Worth instructed each of the election judges for the bond election, and that such instruction basically required the separation of the votes of persons who owned taxable property which had been rendered for taxation from those of other qualified electors or voters who had not rendered property for taxation.

17. That the defendant City of Fort Worth and Roy A. Bateman made available two separate

affidavits for voters at the polling places on April 11, 1972, one of such affidavits being for persons owning taxable property which had been duly rendered or assessed for taxation, and the other affidavit being for persons who did not wish to sign an affidavit showing ownership of taxable property which has been duly rendered or assessed for taxation. These affidavits are Plaintiffs' Exhibits C-1 and C-2, and these exhibits are also identified as Exhibit K in Plaintiffs' First Amended Complaint.

18. That the returns of the municipal election of the City of Fort Worth held on April 11, 1972, were canvassed and approved by the City Council of said City in regular, open, public meeting on April 17, 1972, which canvass and approval reflect the following:

"Councilman Gandy made a

motion, seconded by Councilman Briscoe, that the tabulation of returns of the City of Fort Worth Bond Election held April 11, 1972, as prepared from the certified returns, submitted by the judges and clerks in each election precinct and presented by the City Secretary, be found correct, and that the votes cast on Proposition No. 1, as submitted were:

	Owners of Property Rendered for Taxation	Non-Rendererers	Total
For	13,466	4,094	17,560
Against	9,834	850	10,684

and that the votes case on Proposition No. 2 were:

For	10,849	3,758	14,607
Against	12,234	1,132	13,366

and that the tabulation of returns of said election be in all things approved and adopted. When the motion was put to a vote by the Mayor, it prevailed unanimously."

19. That prior to issuing and selling any general obligation bonds, it is a matter of

necessity to publish an official notice of sale thereof; to describe and provide for terms and specifications in the sale thereof; to make provision for redemption, denomination, type of bid and interest rates, and basis of award; to provide for a good faith deposit; to provide for printing and the furnishing of the purchaser's written opinion; to provide no-litigation certificates; to provide for delivery; to regulate future sales; and to prepare and furnish an official bid form; and that after the taking of bids thereon, it is necessary to provide a complete transcript of the proceedings, to adopt an ordinance levying the tax to pay the interest and provide a sinking fund, to provide a statement of the total bonded indebtedness of the City, including the series of bonds proposed, together with the amount of the assessed value of the real, personal and mixed

property in the City for purposes of taxation as shown by the last official assessment rolls, to submit the bonds to the Attorney General of Texas for inspection and certification pursuant to Article 709d of the Texas Revised Civil Statutes, and to furnish the Attorney General with any additional information that he may require.

20. That the defendant City Attorney, S. G. Johndroe, Jr., has advised the City Council of the opinion delivered March 10, 1971, in Montgomery Independent School District v. Crawford Martin, Attorney General of Texas, 464 S. W. 2d 638 (1971), wherein the Texas Supreme Court upheld the validity of Article 6, Section 3a, of the Texas Constitution when challenged on the ground that it violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United

States; and the Supreme Court of Texas also found that such provision did not violate, but strengthened, the Equal Protection Clause of the Fourteenth Amendment; and that the defendant City Attorney, S. G. Johndroe, Jr., as admitted in Paragraph 22 of the Original Answer of Defendants, R. M. Stovall et al., further advised the City Council of the City of Fort Worth of the procedural steps and necessary prerequisites prior to the issuance and sale of general obligation bonds as set out above in Stipulation No. 19.

21. That the defendants, City Council members of the City of Fort Worth, when acting as a body in their official capacity as City Council members and as the duly authorized governing body of the City of Fort Worth, have the "authority to provide for the issuance and sale of bonds for permanent improvements and

for any other legitimate municipal purpose as may be determined by the City Council"; and that such authority is conferred in part upon the City Council by Chapter XXV, Section 19, of the Charter of the City of Fort Worth.

22. That defendant Roy A. Bateman, in his capacity as City Secretary of the City of Fort Worth, had the following duties with respect to the April 11, 1972, City of Fort Worth bond election as set forth in Ordinance No. 6644 of the City of Fort Worth:

"SECTION 6.

"That the official ballots to be used shall be in compliance with the applicable provisions of Article 6.05 of the Election Code of the State of Texas, as amended, and shall have written or printed thereon the following:

PROPOSITION NO. 1.

"Place an 'X' in the square

beside the statement indicating the way you wish to vote.

☐ FOR

☐ AGAINST

Shall the City of Fort Worth, Texas, through its City Council, issue its negotiable coupon bonds in the principal sum of Three Million Dollars ($3,000,000.00) for the legitimate municipal purpose of acquiring, equipping and improving the physical equipment and personal property of the Fort Worth Transit Company, a private corporation, and acquiring the necessary lands therefor, said bonds being payable serially as may be determined by the City Council, so that the last maturing bonds shall become payable within forty (40) years from the date thereof, bearing interest at a rate not to exceed the maximum prescribed by the law at the time of the issuance thereof, payable

semi-annually, and levy a sufficient tax to pay the interest on said bonds and create a sinking fund sufficient to redeem said bonds at the maturity thereof?

PROPOSITION NO. 2.

"Place an 'X' in the square beside the statement indicating the way you wish to vote.

☐ FOR

☐ AGAINST

Shall the City of Fort Worth, Texas, through its City Council, issue its negotiable coupon bonds in the principal sum of Six Million, Eight Hundred Sixty-Thousand Dollars ($6,860,000.00) for the purpose of making permanent city improvements by constructing, building, improving and equipping buildings for the public library system and acquiring the necessary lands therefor,

said bonds being payable serially as may be determined by the City Council, so that the last maturing bonds shall become payable within forty (40) years from the date thereof, bearing interest at a rate not to exceed the maximum prescribed by law at the time of the issuance thereof, payable semi-annually, and levy a sufficient tax to pay the interest on said bonds and create a sinking fund sufficient to redeem said bonds at the maturity thereof?

"SECTION 7.

"That the City Secretary is hereby ordered and directed to prepare and issue ballots for absentee voting and for the special election and to stamp same 'Official Ballot,' on which ballots shall be printed the propositions hereinabove set forth.

****

"SECTION 10.

"That the City Secretary shall furnish election officials said ballots,

together with any other forms, blanks or instructions in accordance with the Charter of the City of Fort Worth, Texas, and the laws of the State of Texas insofar as same are applicable, and the provisions of this ordinance unless a court of competent jurisdiction orders otherwise.

"SECTION 11.

"That the way and manner of holding this election, the notice to be given therefor, the polling places, the personnel of the officers, precinct judges and substitutes therefor who are to hold the same, and all details connected with the holding of the election shall be determined and arranged by the City Council and administered under the direction of and by the City Secretary.

****

"SECTION 13.

"That the City Secretary is hereby authorized and directed to cause notice of said election to be given by posting a substantial copy of this election order in each of the election precincts of said

City and also at the City Hall. That this notice of said election shall also be published on the same day in each of two (2) successive weeks in a newspaper of general circulation published within said City, the date of the first publication to be not less than fourteen (14) days prior to the date set for said election, and the City Secretary shall see that proper publication is made and proper notice of this election is given, in full conformity with the Charter of the City of Fort Worth, Texas, and the applicable statutes of the State of Texas."

23. That on the 13th day of March, 1972, the City Council of the City of Fort Worth adopted Ordinance No. 6644, which provided for the submission of two propositions to the electorate of the City of Fort Worth, the election to be held on April 11, 1972; and that such propositions are set out in Stipulation No. 22 above (Section 6 of Ordinance No. 6644).

That Ordinance No. 6644 provided in Section 3 thereof for the holding of two separate but simultaneous elections, as follows:

"SECTION 3.

"That said election shall be held and conducted, in effect, as two separate but simultaneous elections, to-wit: One election at which only the resident, qualified electors who own taxable property in the City and who have duly rendered the same for taxation shall be entitled to vote on said propositions, and another election at which all other resident, qualified electors of the City shall be entitled to vote on said propositions. The votes cast at each of said separate but simultaneous elections shall be recorded, returned and canvassed separately. It is hereby declared that the purpose of holding the election in such manner is to ascertain arithmetically:

(a) The aggregate votes cast at the election for and against said propositions by resident, qualified electors of the

City; and also

(b) The aggregate votes cast at the election for and against said propositions by resident, qualified electors who own taxable property in the City and who have duly rendered the same for taxation.

Each elector shall be entitled to vote once on each of the propositions in accordance with the foregoing provisions of this ordinance.

"That the above and foregoing dual election procedure shall be followed unless a court of competent jurisdiction orders otherwise."

24. The Attorney General's policy in the approval of general obligation tax bonds since December 19, 1969, has been that each proposition must be approved by the property-owning ad valorem taxpayers whose property has been duly rendered (as required by Article 6, §§ 3 and 3(a) of the Texas Constitution) and each pro-

position must also receive the approval of the aggregate vote of property-owning ad valorem taxpayers whose property has been duly rendered and all other qualified electors (the test required by the Phoenix case).

This position was taken to insure that all general obligation tax bonds voted in Texas would be in full compliance with the Texas law and at the same time be protected in the event the Supreme Court of the United States subsequently holds the Texas voter qualification test for tax bond elections invalid. As a practical matter, until such time as the Texas law is tested in the Federal Courts, the municipal bonds of this State and its political subdivisions would be unmarketable without this protective procedure.

The Texas Supreme Court in Montgomery Independent School District v. Crawford Martin,

Attorney General of Texas, 464 S. W. 2d 638 (1971), has spoken on the question of who shall vote in general obligation tax bond elections in Texas and it is incumbent upon the Attorney General of Texas to insure that the directives of that Court are complied with in the approval of tax bonds. In those instances when tax bonds are not involved, the decisions of the United States Supreme Court in Kramer v. Union Free School District, 395 U. S. 621 (1969), and Cipriano v. City of Houma, 395 U. S. 701 (1969), are followed.

24A. If Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, were present in court, he would testify under oath that the requirement of rendition of property, personal and mixed, tangible and intangible, as a prerequisite to vote in a general obligation bond election is a matter of compelling necessity by

reason of the plain and simple fact that no property is more susceptible of concealment than is personal and mixed, tangible and intangible property.

He would further testify, if he were present in court, that for the year 1970, the total personal property rendered for taxation in Texas amounted to $3,996,729,956.00 and for the year 1971 amounted to $4,261,631,147.00, which is an increase of 6.23%. This increase of $264,901,191.00 in personal property renditions for the year 1971 constitutes 11.59% of the over-all increase in renditions of real, personal and mixed property over that rendered in 1970, which produces dollar-wise an additional $529,802.38 in revenues to the State. The total approximate revenues to the State as a result of ad valorem tax on personal property in the year 1971 amounted

to approximately $8,523,262.30.

24B. If Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, were present in court, he would testify under oath that the requirement of rendition and disclosure of property for purposes of ad valorem taxation is of the utmost importance, that there is a compelling necessity for an effective system of tax assessment and collection, and that such a system is mandatory for the orderly creation of, payment of and discharge of tax bond obligations.

25. That the declared intent of the City Council of the City of Fort Worth with respect to the sale and issuance of the general obligation tax-supported bonds as declared in the adoption of Ordinance No. 6644 was as follows:

"SECTION 8.

"That in the event the tax-

supported bonds are authorized at the special election hereby ordered, the City Council of the City of Fort Worth, Texas, may issue for sale any part or portion of said amounts at such time and times as in the judgment of the City Council it determines that a lawful interest and sinking fund may be provided for to take care of and discharge any part or portion of the bonds so issued for sale, it being the purpose of this section to make clear that the City Council of the City of Fort Worth, Texas, may not be required to issue the full amount of the series of the bonds as herein submitted but may issue for sale any portion of the same at such time and times as it determines advisable, under the authority hereby conferred after said election."

26. That assuming the requirements in Articles 5.03, 5.04 and 5.07 of the Texas Election Code and in Article 6, Sections 3 and 3a, of the Texas Constitution (which statutory and constitutional provisions all defendants have

taken an oath "to support, protect and defend") did not exist, and assuming the policy of the Attorney General of Texas, as set forth in Stipulation No. 24 above, had never been announced and declared, then the City Council of the City of Fort Worth could exercise its independent legislative judgment and discretion and by ordinance would take such steps and procedures necessary to prepare for the issuance and sale of the Library Bonds submitted in Proposition No. 2 (Section 6 of Ordinance No. 6644).

27. That assuming the requirements in Articles 5.03, 5.04 and 5.07 of the Texas Election Code and in Article 6, Sections 3 and 3a, of the Texas Constitution (which statutory and constitutional provisions all defendants have taken an oath to "support, protect and defend") did not

exist, and assuming the policy of the Attorney General of Texas as set forth in Stipulation No. 24 above had never been announced and declared, and assuming that the City Council of the City of Fort Worth determined it advisable, in the exercise of its independent legislative judgment and discretion, to take such steps and procedure necessary to prepare for the issuance and sale of the Library Bonds submitted in Proposition No. 2 (Section 6 of Ordinance No. 6644), then and in such event the defendant Mayor of the City of Fort Worth, acting in his official capacity, would, as soon as possible and as soon as is consistent with orderly procedure and due care, inasmuch as Proposition No. 2 in the April 11, 1972, bond election received a majority of votes cast by all non-rendering and rendering voters of the City of Fort Worth, Texas, and before any of such

bonds were offered for sale, cause to be forwarded to the Attorney General the bonds and a transcript thereof, together with a certified copy of the order or ordinance levying the tax to pay the interest and provide a sinking fund, and the statement of the total bonded indebtedness of the City, including the series of bonds proposed, together with the amount of the assessed value of the City for purposes of taxation as shown by the last official assessment of such City, and would also furnish the Attorney General with any additional information he might require.

28. That on April 17, 1972, the City Council of the City of Fort Worth, Texas, while in regular session, unanimously adopted the following motion:

> "Councilman Gandy made a motion, seconded by Councilman Briscoe, that the City Council go

on record as stating that if the legal entanglements did not exist, the City would proceed to sell the library bonds voted April 11, 1972, to build a new central library, provided the other terms and conditions surrounding the sale of the bonds and construction bid procedures were reasonable and acceptable to the City Council, and when the motion was put to a vote by the Mayor, it prevailed unanimously."

29. That some time after the bond election held on April 11, 1972, defendant S. G. Johndroe, Jr., City Attorney of the City of Fort Worth, Texas, advised the City Council of said City "that the Attorney General has refused to certify bonds approved in identical circumstances, and it would be pointless to submit the Library Bonds (that is, the bonds submitted in Proposition No. 2) to the Attorney General," and he generally advised the City Council of the City of Fort Worth that it is just the same as if the issue had failed.

30. That assuming that the requirements in Articles 5.03, 5.04 and 5.07 of the Texas Election Code and in Article 6, Sections 3 and 3a, of the Texas Constitution (which statutory and constitutional provisions all defendants have taken an oath "to support, protect and defend") did not exist, and assuming that the policy of the Attorney General of Texas, as set forth in Stipulation No. 24 above, had never been announced and declared, and further assuming that the City Council of the City of Fort Worth had exercised its independent legislative judgment and discretion and had the City Attorney take such steps and procedure necessary for him to prepare for the issuance and sale of the Library Bonds submitted in Proposition No. 2 (Section 6 of Ordinance No. 6644), then and in that event the defendant City Attorney of the City of Fort

Worth would prepare all instruments and documents necessary for the issuance and sale of the Library Bonds and endorse his approval thereon.

31. That on April 11, 1972, plaintiffs Michael L. Stone, Dorothy I. Ellis, Pat (Mrs. George A.) Crowley, James D. Henderson and Marjorie M. Watson were resident, qualified electors of the City of Fort Worth, the State of Texas, and the United States, and all of the plaintiffs remain such resident, qualified voters to this date.

32. That plaintiff Pat Crowley is one and the same person as "Mrs. George A. Crowley," who holds Tarrant County Voter Registration Certificate No. A-137229.

33. That all of the plaintiffs voted in the City of Fort Worth bond election held on April 11, 1972; that all of the plaintiffs cast ballots on

both of the propositions submitted; and that all of the plaintiffs voted "for" (in favor of) the Library Bonds, Proposition No. 2.

34. That plaintiffs Michael L. Stone, Dorothy I. Ellis and James D. Henderson voted as qualified voters of the City of Fort Worth and not as rendering property owners, and that they voted "for" (in favor of) Proposition No. 2. (See Affidavit, Plaintiffs' Exhibit E; also identified as Exhibit C in Plaintiffs' First Amended Complaint)

35. That plaintiffs Pat Crowley and Marjorie M. Watson voted in the City of Fort Worth bond election on April 11, 1972, as rendering property owners, and that they voted "for" (in favor of) Proposition No. 2. (See Affidavit, Plaintiffs' Exhibit F; also identified as Exhibit D in Plaintiffs' First Amended Complaint)

36. That all of the above plaintiffs are

fully competent to testify to the matters of fact contained in Stipulations Nos. 31 through 35, inclusive, and that each plaintiff has personal knowledge of that portion of such facts which pertain directly to him.

37. That if plaintiffs Michael L. Stone, Dorothy I. Ellis, Pat Crowley, James D. Henderson and Marjorie M. Watson were present in court, they would testify under oath to the matters of fact stipulated by the parties hereto in Stipulations Nos. 31 through 35, inclusive.

That the defendants stipulate that they have no evidence or testimony to present to this Court which would in any way contradict or impeach the truth of the matters of fact stated in Stipulations Nos. 31 through 35, inclusive.

38. That all of the bonds proposed to be issued under Proposition No. 2 (Library Bonds)

would be general obligation, tax-supported bonds.

39. That the principal of and interest on general obligation, tax-supported bonds issued and sold by the City of Fort Worth to bona fide purchasers for value are paid solely from the revenues from taxes levied, assessed and collected by the City of Fort Worth from persons who own real, personal or mixed property which has been rendered for taxation.

40. That if defendant Roy A. Bateman were present in court, he would testify under oath that the requirement of rendition of property, personal and mixed, tangible and intangible, is a matter of vital importance and necessity to local taxing authorities by reason of the plain and simple fact that no property is more susceptible of concealment than is personal and mixed, tangible and intangible property; and

and that the requirement of voluntary rendition and disclosure of such property for purposes of ad valorem taxation is of the utmost importance and vitally necessary for an effective system of ad valorem tax assessment and collection and is directly and inextricably related to the creation of, payment and discharge of tax-supported bond obligations.

41. That if defendant Roy A. Bateman were present in court, he would testify under oath that the ad valorem tax is the life blood of local government financing and that the increasing burdens of local needs and inflation make ever increasing demands on local governments for additional tax revenues.

42. That if defendant Roy A. Bateman were present in court, he would testify under oath that the principal and interest on general

obligation, tax-supported bonds issued by the City of Fort Worth are, and will be, paid solely from the proceeds derived from taxes levied, assessed and collected from persons who own real, personal or mixed property which has been duly rendered for taxation; that the assessed valuation of real (including improvements), personal and mixed property in the City of Fort Worth for the fiscal year 1970-71 was $1,370,483,290; that of such assessed valuation, real property constituted $1,017,895,540, and personal and mixed property amounted to $352,587,750; that the assessed valuation of real (including improvements), personal and mixed property in the City of Fort Worth for the fiscal year 1971-72 was $1,444,024,440; and that of such assessed valuation, real property constituted $1,077,271,500 and personal and mixed property amounted to

$366,752,240.

43. That if defendant Roy A. Bateman were present in court, he would testify under oath that for the year ending September 30, 1970, the City of Fort Worth derived $16,388,154 in taxes from real property rendered and placed on the assessment rolls and $5,676,669 from personal and mixed property rendered and placed on the assessment rolls; that for the year ending September 30, 1971, the City of Fort Worth derived $18,205,947.35 in taxes from real property rendered and placed on the assessment rolls and $6,198,138.73 from personal and mixed property rendered and placed on the assessment rolls; and that more than one-fourth of the total funds derived from taxation in the City of Fort Worth for the years 1970-71 was derived from the taxation of personal and mixed property in said City.

44. That if defendant Roy A. Bateman were present in court, he would testify under oath that the fiscal year 1971-72 will require that from the funds derived from taxation, the sum of $7,364,524 must be allocated for principal and interest payments on general obligation tax bonds outstanding, which bonds are owned and held by bona fide purchasers for value throughout not only the entire United States but the world, and that the requirement of rendition of personal and mixed property, tangible and intangible, as a prerequisite to vote in a general obligation bond election is a matter of compelling necessity to the City of Fort Worth by reason of the plain and simple fact that no property is more susceptible of concealment than is personal and mixed, tangible and intangible property.

That as of December 31, 1971, the outstanding unpaid general obligation tax bond indebtedness of the City of Fort Worth was $92,852,000.

That the City Council of the City of Fort Worth must provide funds to meet its outstanding general obligation tax bond payments during the fiscal year 1971-72 in the amount of $7,364,524, and that in excess of $1,840,000 of such $7,364,524 must be obtained from taxes derived from the rendition of personal and mixed property in the City of Fort Worth.

45. That the defendant Roy A. Bateman is fully competent to testify to the above matters of fact contained in Stipulations Nos. 40 through 44, inclusive, and as Treasurer of the City of Fort Worth, he has personal knowledge of such facts.

46. That plaintiffs stipulate that they have

no evidence or testimony to present to this Court other than that contained in the foregoing stipulations which will in any way contradict or impeach the truth of the matters of fact stated in Stipulations Nos. 24, 24A, 24B, 40, 41, 42, 43, 44 and 45. That plaintiffs do not, however, stipulate that these reasons are sufficient to deny some resident, qualified voters of these taxing authorities the right to have their vote fully counted in bond elections, nor do they admit that these reasons satisfy the legal tests of Kramer v. Union Free School District, 395 U. S. 621, 89 S. Ct. 1886, 23 L. Ed. 2d 583 (1969), to the effect that restrictions on the right of otherwise qualified voters to vote (other than those of age, residence, etc.) must be necessary to promote a compelling State interest. 395 U. S. 621 at 627, 89 S. Ct. 1886 at 1890, 23 L. Ed. 2d 583 at 589.

Furthermore, the plaintiffs object to any testimony that there is a compelling necessity for exclusion of non-property owners in this type of election on the grounds that such testimony is a conclusion of law on the part of the witness and that such testimony invades the province of the Court in deciding questions of law.

47. On April 11, 1972, the City of Fort Worth in fact held a bond election submitting two propositions to the voters: Proposition Number 1 provided for approval or non-approval by the voters of bonds for a transportation system; Proposition Number II provided for approval or non-approval of bonds by the voters for library facilities. On April 11, 1972, the following votes were cast and recorded on Proposition Numbers I and II in such Fort Worth city bond election:

Owners of Property Rendered for Taxation		Non-Renderers	Total
Proposition I			
For	13,466	4,094	17,560
Against	9,834	850	10,684
Proposition II			
For	10,849	3,758	14,607
Against	12,234	1,132	13,366

48. The defendant City of Fort Worth, with the appropriate approval by the defendant City Council members of the City of Fort Worth, the defendant Mayor R. M. Stovall, and the defendant City Attorney S. G. Johndroe, Jr., has sold the Transportation System bonds approved by the voters of the City of Fort Worth in Proposition Number I in the April 11, 1972 bond election.

6.

CONTESTED ISSUES OF FACT

The defendants contend that there are no contested genuine issues of material fact.

The plaintiffs contend that there are the following contested issues of fact:

(1) That the manner in which the election was held tended to deter non-property owners, or those who were not willing to affirm ownership or rendition of property, from voting.

(2) That there is no necessity in support of a compelling State interest to hold elections in the manner in which the April 11, 1972, election was held by the City of Fort Worth.

7.

CONTESTED ISSUES OF LAW

(a) Whether or not plaintiffs have failed to state a claim upon which relief can be granted.

(b) Whether or not the six (6) plaintiffs represent a class.

(c) Whether or not the facts in this cause entitle plaintiffs to injunctive relief under the provisions of 42 U. S. C., Section 1983.

(d) Whether or not plaintiffs are entitled to injunctive relief and a declaratory judgment, all as prayed for in their First Amended Complaint.

(e) Whether or not Article 6, Sections 3 and 3a, of the Texas Constitution and Articles 5.03, 5.04 and 5.07 of the Texas Election Code are unconstitutional on the ground that they violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

8.

TESTIMONY

There will be no oral testimony.

9.

EXHIBITS

Counsel for each party have examined certain exhibits and, reserving all trial or hearing objections thereto save only those of authenticity, number them as follows:

Plaintiffs' exhibits marked Plaintiffs' Exhibit "A" through Plaintiffs' Exhibit "F", inclusive.

Defendants' City of Fort Worth et al. exhibits marked as Defendant City Exhibit "A", Defendant City Exhibit "A-1", Defendant City Exhibit "B" and Defendant City Exhibit "C".

Defendant's Crawford Martin exhibit marked Defendant Attorney General's Exhibit "A".

All of such exhibits are admitted into evidence.

10.

ADDITIONAL MATTERS

There are no additional matters known to the parties that will aid the Court in disposing of the case.

11.

BRIEFS

The parties may furnish briefs to the Court which shall be filed not later than the _____ day of _____, 19___.

RENDERED AND SIGNED this the 8th day of November, 1972.

_____
UNITED STATES DISTRICT JUDGE

APPROVED:

Don Gladden
Attorney for Plaintiffs

S. G. Johndroe, Jr.
Attorney for Defendants
R. M. Stovall, Mayor;
S. G. Johndroe, Jr., City
Attorney; Roy A. Bateman,
City Secretary; and the
City of Fort Worth and its
City Council Members

Robert B. Davis,
Assistant Attorney General
Attorney for Defendant,
Crawford Martin, Attorney
General

Supreme Court, U. S.
FILED
JUN 27 1974
MICHAEL RODAK, JR., CLERK

NO. 73-1723

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

JOHN L. HILL, ATTORNEY GENERAL OF TEXAS,
APPELLANT

V.

MICHAEL L. STONE, ET AL,
APPELLEES

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

MOTION TO AFFIRM

DON GLADDEN
MARVIN COLLINS
702 Burk Burnett Bldg.
Fort Worth, Texas

June 27, 1974

I N D E X

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NO. 73-1723

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

JOHN L. HILL, ATTORNEY GENERAL OF TEXAS,
APPELLANT

V.

MICHAEL L. STONE, ET AL,
APPELLEES

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

MOTION TO AFFIRM

TO THE HONORABLE UNITED STATES SUPREME COURT:

Appellees Michael Stone, et al, move this Court to summarily affirm the judgment of the three-judge court below pursuant to Rule 16(1)(c), (d)

of the Rules of this Court. The unusual length of this Motion to Affirm is attributable to the desire of counsel to include herein all relevant material and argument necessary to a resolution of this case without further hearing, oral argument, or briefing.

STATEMENT

I. Nature of the Case

The judgment on March 25, 1974 of the three judge court below holding unconstitutional and enjoining the implementation of the herein challenged Texas provisions was stayed by this Court only to the extent of permitting the Attorney General to continue enforce the dual balloting procedures effectuated by him in 1969 as a "temporary measure" pending resolution of the constitutional issues involved in Phoenix v. Kolodziejski, 399 U. S. 204 (1970). (pp. 8, 11, AG Juris. State.).[1]

II. Facts of the Case

There are no disputed facts in this case. On April 11, 1972 the City of Fort Worth held a bond election. A $6.8 Million Library Bond issue and a $3.0 Million Transportation System Bond issue were submitted to the electorate in dual box election. (Stip. #22, 23, pp. 12d-17d, AG Juris. State.) The Transportation System bonds passed in the property

[1] For convenience of reference, all citations to the judgment and opinions below as well as facts stipulated by the parties in the Pre-Trial Order will be to the appropriate pages in the Jurisdictional Statement of the Texas Attorney General, cited hereafter as "p. ____, AG Juris. State.".

owner box and the non-property owner box. (Stip. #47, p. 29d, AG Juris. State.) Those bonds have long since been certified by the Attorney General and sold by the City of Fort Worth. (Stip. #48, pp. 29d, 30d, AG Juris. State.) The Library Bonds passed in the non-property owner box, passed in the aggregate majority of persons voting in both boxes, but failed in the property owner box. (Stip. #47, p. 29, AG Juris. State.)

The Attorney General, whose approval is a prerequisite to sale of any general obligation bonds in Texas, has continuously refused since 1969 to approve any bonds unless such bonds received a majority vote of the aggregate of property owners and non-property owners and a majority vote of property owners. (Stip. #24, p. 17d, AG Juris. State.) While everyone otherwise qualified is theoretically entitled to vote, property owners are given a veto.

The City considered the Library Bond issue to have failed. (Stip. #29, p. 22d, AG Juris. State.)

The decision to sell the bonds is a legislative decision resting with the governing body of the appropriate political subdivision. In this case, the City Council of the City of Fort Worth is vested with such discretion. (Stip. #10, pp. 5d, 6d, AG Juris. State.) However, in this case, there is absolutely no question how the council would exercise its discretion. They would sell the Library Bonds if they could. The following facts make that clear:

1. Unless the city had intended to sell such bonds it is absurd to believe that they would adopt an ordinance submitting the proposition to the voters and spend the money necessary to conduct a city-wide election on that proposition. (See Stip. #9, p. 5d, AG Juris. State.; Pl. Ex. B)

2. The City Council has in fact sold the bonds approved by a majority of the rendering property owners in Proposition 1 (Transportation System Bonds) which was submitted at the same time as Proposition 2 (Library Bonds). (Stip. #48, pp 29d, 30d, AG Juris. State.)

3. The City Council has stated in a motion adopted unanimously on April 17, 1972, that their legal discretion would be exercised in favor of the sale of the bonds if legal entanglements did not exist. (Stip. #28, pp. 21d, 22d, AG Juris, State.)

4. The City Council, the city attorney, and the mayor have stipulated that if the property rendition requirements did not exist, they would take the necessary steps to sell the Library Bonds as soon as possible. (Stip. #26, 26, 30, pp. 20d-22d, AG Juris. State.)[2]

Appellees, property owners and non-property owners who voted in that election, brought this suit challenging Texas provisions of law limiting the right to vote in bond elections to rendering property owners, and seeking to enjoin the Attorney General and the City from considering the property ownership requirements of Texas law in determining whether the bonds passed.

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[2] There are a number of technical procedural steps the City would have to take as prerequisite to issuance and sale of the Library Bonds. An exhaustive list of these steps appears in Stipulation #19, pp. 26, 27, P-T. All city officials involved have stipulated that they would take all of such necessary steps. (Stip. #26, 27, 30, pp. 34-37, P-T)

SUMMARY OF ARGUMENT

I. PRIMARY INDISTINGUISHABLE DECISION OF THIS COURT.

In Phoenix v. Kolodziejski, 399 U. S. 204 (1970) this Court held unconstitutional Arizona statutes and constitutional provisions which limited the right to vote in general obligation bond elections to real property taxpayers. There is no substantial distinction between that case and the case at bar. Both cases involve general obligation bond elections. While Phoenix, supra, involved restriction of the franchise to real property taxpayers, the case at bar involves restriction of the franchise to rendering property owners ("property" including personal property), but there is no rational distinction between Phoenix and the case at bar which can be made on that basis. Both Phoenix and the case at bar involve municipal improvements of general public interest such as parks, playgrounds, libraries, transporation systems, etc. In Phoenix, it was certain that more than half the debt service requirements on the bonds would be satisfied from revenues of the other local taxes paid by non-property owners. In the case at bar the testimony was the the general obligation bonds would be paid off solely from the proceeds of taxes of persons who own real and personal property. However, this Court in Phoenix, spoke directly to that issue stating that,

> "justification for restricting the franchise to the property owners seems to be the strongest in the case of municipality which, unlike Phoenix, looks only to property tax revenues for servicing general obligation bonds. But even in such a case the justification would be insufficient." [emphasis added], Phoenix, supra, at page 210

One of the district judges below who concurred in the result reached by the unanimous court below could find no way to distinguish Phoenix, supra. He stated in his opinion,

> "I deeply regret that I have been unable to find a legitimate way to distinguish the cases above cited. [Phoenix]." (Concurring opinion of Judge Brewster, p. 22 AG Juris. State.).

There is direct precedent for this court summarily affirming the decision of the court below in this case. In Parish School Board of the Parish of St. Charles v. Stewart, aff'g 310 F. Supp. 1172 (EDLa...1970), 400 U. S. 884 (1970), a three judge district court within the Fifth Circuit held that Louisiana provisions limiting the right to vote in general obligation bond elections to "property taxpayers" were unconstitutional. The term "property taxpayers" included those who paid tax on personal property. This Court affirmed in a memorandum opinion citing Phoenix, supra.

II. APPELLANT ATTORNEY GENERAL OFFERS NO ARGUMENT WHATSOEVER IN HIS JURISDICTIONAL STATEMENT THAT THE TEXAS CLASSIFICATORY SCHEME CHALLENGED IN THIS CASE MEETS THE COMPELLING STATE INTEREST TEST ANNOUNCED BY THIS COURT IN KRAMER V. UNION FREE SCHOOL DISTRICT, 395 U. S. 621 (1969) and PHOENIX V. KOLODZIEJSKI, 399 U. S. 204 (1970)

The argument contained in that jurisdictional statement is primarily based upon two contentions:

1. That this Court should apply the rational basis equal protection standard to the case at bar in spite of Phoenix, supra,;

2. That this Court's decisions in Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U. S. 719 (1973) and Associated Enterprises, Inc. v. Tol-Tec Watershed Improvement District, 410 U. S. 743 (1973) are authority for this Court to uphold the constitutionality of the Texas classificatory scheme.

As to the first of such contentins it is respectfully submitted that this Court may apply the rational basis standard instead of compelling state interest test to the case at bar only if it is willing to overrule Kramer, supra, Cipriano v. Houma, 395 U. S. 701 (1969), Phoenix, supra, and Parish School Board of the Parish of St. Charles v. Stewart, supra.

As to the second contention it is respectfully submitted that neither Salyer nor Associated Enterprises offer a basis for upholding the constitutionality of the challenged Texas provisions. Neither of such cases involve bond elections. More fundamentally, however, both of those cases held in essence that when land is virtually the only thing affected by the outcome of an election, and the impact of the election on land alone is clear, then the franchise may be restricted to real property owners. The challenged Texas classificatory scheme in no way limits the franchise to persons primarily affected by the outcome of the election at bar. In what manner can it be said that the restriction of the franchise to rendering property owners restricts the franchise to persons primarily interested in the outcome of a library bond election? There is simply no manner, rational or irrational in which property ownership or rendition of property for taxation is related to the use of public library.

It is interesting to note that even though the Attorney General has suggested the propriety of this Court applying the rational basis standard rather than the compelling state interest test, he does not advance even one rational basis on which it can be said that non-rendering property owners or non-property owners should be disenfranchised by the State of Texas in bond elections involving issues of general concern to the community. Perhaps that failure on the part of the Attorney General is because there is no such rational basis.

III. THE DECISION OF THE COURT BELOW IS CLEARLY CORRECT.

The Texas Supreme Court in Montgomery Independent School District v. Martin, 464 S.W.2d 638 (Tex. Sup. 1971) upheld the constitutionality of the voting classification challenged in this case in the face of this Court's decision in Phoenix, supra. The Texas Supreme Court avoided any meaningful attempt to apply the standards set down by this Court in Phoenix.

By virtue of this Court's decision in Kramer v. Union Free School District, supra, these challenged Texas provisions are not entitled to the general presuption of constitutionality afforded state laws.

This Court in Harper v. Virginia State Board of Elections, 383 U. S. 663 (1966), struck down the constitutionality of a poll tax in Virginia. Applying the rational basis standard, this Court held that,

> "wealth like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process." Harper, supra, at 668.

One of the avowed purposes of the Texas classificatory scheme - to encourage disclosure and rendition of taxable property - has no more relation to voter qualifications than does wealth, highway safety, or any number of other topics in which the state is otherwise legitimately concerned. Assuming arguendo that the Texas scheme somehow limits the franchise to those who will pay for the obligation assumed in the election, this does not prevent a voter from intelligently exercising his ballot. If it may be said for the purposes of argument that the classificatory scheme in this case somehow limits the franchise to those who are primarily interested in the outcome of the election this, too, is no justification since it does not render a voter incapable of casing an intelligent ballot. Both the opinion of the Texas Supreme Court and the jurisdictional statement of the Attorney General assert that the Texas classificatory scheme does not stop anyone from voting who really wishes to vote, since there in no minimum amount of property which a person may render, and he need not have paid the tax. That contention was answered emphatically in Harper, supra:

> "We say the same whether the citizen otherwised qualified to vote, has a dollar and fifty cents in his pocket or nothing at all, pays the fee or fails to pay it." 383 U. S. at 668.

This Court in Kramer v. Union Free School District, supra, Cipriano v. Houma, supra, and Phoenix v. Kolodziejski, supra, laid down the applicable tests to be applied in this case:

1. There must be a compelling state interest for the classification;

2. And the classification must be necessary to promote that compelling state interest.

Assuming for the sake of argument that the challenged classificatory scheme does somehow encourage citizens to disclose and render for taxation a token amount of property, rendition of a thirty cent pencil is something less than compelling. And this is all it takes to vote. Exclusion of a voter from the polls in a bond election is a clumsy and imprecise manner in which to collect taxes. There are other recognized, better methods to encourage rendition of taxable property. Thus, these challenged voting laws are not necessary to encourage citizens to render property for taxation.

Assuming arguendo that the classificatory scheme challenged here somehow limits the franchise to those who will pay for the obligations assumed in the election, this is not a compelling state interest. It disenfranchises multitudes of persons who are interested in such broad issues as a transportation system or libraries. The Court in Stewart v. Parish School Board of St. Charles Parish, 310 F. Supp. 1172 (1970), aff'd mem. 400 U. S. 884 (1970) held that the special interests of property taxpayers is not a compelling state interest. Moreover, there are many persons otherwise qualified to vote who have no property rendered for taxation in the year of the election, but who will render property and pay taxes in the future years. That money will be applied to the retirement of the bonds. Others will effectively pay property taxes in the form of rent or costs of goods sold.

Limiting the franchise to those who are primarily interested in the outcome of the election (if indeed this could be done) would not be a com-

pelling state interest for the reason that the voter not primarily interested in the outcome could nevertheless cast an intelligent informed ballot. However, that question is effectively pretermitted by recognition that no rational argument can be made that a requirement of rendition of property for taxation in any manner limits the franchise in a library bond election to the persons primarily interested in the outcome.

Kramer, supra, Cipriano, supra, Phoenix, supra, and Parish School Board of the Parish of St. Charles, supra, really do not leave even one significant question which this Court needs to answer about the constitutionality of Texas classificatory scheme. In Phoenix, this Court noted:

> "***Nor have we been shown that the fourteen states now restricting the franchise have unique problems that make it necessary to limit the vote to property owners." Phoenix, supra, at page 212-213.

Texas is one of those fourteen states.

In the face of that decision the Texas Supreme Court has squarely held the voting scheme challenged herein unconstitutional.

Since virtually the complete record in this case is before the Court and all evidentary matters are undisputed, this Court should affirm on the merits without briefing, oral argument, or further hearing.

ARGUMENT AND AUTHORITIES

I. THIS COURT SHOULD SUMMARILY AFFIRM THE DECISION OF THE THREE JUDGE COURT BELOW BECAUSE THIS CASE IS INDISTINGUISHABLE FROM THE DECISION OF THIS COURT IN PHOENIX V. KOLODZIEJSKI.

In Phoenix v. Kolodziejski, 399 U. S. 204 (1970), this Court held unconstitutional Arizona statutes and constitutional provisions which limited the right to vote in general obligation bond elections to real property taxpayers.[3]

A. The Facts of Phoenix v. Kolodziejski are Closely Analagous to Those of the Case at Bar.

The five fundamental points of comparison between Phoenix, supra, and the case at bar demonstrate that there is no substantial distinction between the two cases.

1. Type of Election:

Both Phoenix, supra, and the case at bar involve bond elections.

2. Type of Property:

In Phoenix, supra, the franchise was limited to real property taxpayers, while in the case at bar the franchise is limited to owners of property which is rendered for taxation. The term "property" includes all types of property, real, personal or mixed. The distinction between real property and other types of

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[3] See Appendix C for a full text of the Arizona provisions there held unconstitutional

property is important for many purposes, but certainly the lack of ownership or rendition of personal property constitutes no greater reason to deny the franchise to an otherwise qualified voter than does lack of ownership of real property.

3. Type of Bond:

Both Phoenix, supra, and the instant case involve general obligation bonds.

4. Purpose for Which Bond Money Is Spent:

In Phoenix, supra, the general obligation bonds were to be issued for the purpose of financing various municipal improvements, such as city sewer system, parks, playgrounds, police and public safety buildings, and libraries. In the case at bar it is undisputed that general obligation bonds can be used to finance almost any type of public facility. The two issues involved in the April 11, 1972, City of Fort Worth bond election were a $3 million transportation bond issue and a $6.8 million library bond issue. Clearly the bond issues involved in both instances affect virtually all of the citizens of the respective communities and would be of general interest to all. Phoenix, supra, held that the difference between the interests of property owners and the interests of non-property owners on issues such as

these is not great enough to justify excluding the non-property owners from voting. That holding is equally applicable to the case at bar.

5. Debt Service Requirements:

In Phoenix, supra, the stipulated facts established that it was anticipated that more than half the debt service requirement on the bonds at issue would be satisfied not from real property taxes, but from revenues of other local taxes paid by non-property owners as well as other local taxes paid by persons who own real property. In the case at bar the secretary of the City of Fort Worth testified by stipulation that the principal and interest on general obligation tax-supported bonds issued by the city would be paid solely from the proceeds derived from taxes levied, assessed, and collected from persons who own real, personal or mixed property which has been duly rendered for taxation. (Stip.# 42, pp. 25d, 26d, AG Juris. State.). Thus, there is a distinction between the two cases. However, this court spoke directly to just that distinction in Phoenix, supra, and made it clear that such a distinction would not change the result at all.

> "... the justification for restricting the franchise to the property owners seems to be strongest in the case of a municipality which, un-

like Phoenix, looks only to property tax revenues for servicing general obligation bonds. But even in such a case the justification would be insufficient. Property taxes may be paid intially by property owners, but a significant part of the burden of each year's tax on rental property will very likely be born by the tenant rather than the landlord since, as the parties also stipulated in this case, the landlord will treat the property tax as a business expense and normally will be able to pass all or a large part of this cost on to the tenants in the form of higher rent. Since most city residents not owning their own homes are leasees of dwelling units, virtually all residents share the burden of property taxes imposed and used to service general obligation bonds. Moreover, property taxes on commercial property, much of which is owned by corporations having no vote, will be treated as a cost of doing business and will normally be reflected in the prices of goods and services purchased by non-property owners and property owners alike." [Emphasis Added] Phoenix v. Kolodziejski, supra, at pages 210, 211.

Precisely the same situation obtains in the case of persons owning substantial personal or mixed property who pass the taxes on to consumers and other persons. The likelihood of passing on taxes to consumers in the case of personal property is perhaps stronger. In fact the proposition that property taxes are passed on through the sales of personal property and goods and services is specifically recognized in the above quotation from this Court's opinion in Phoenix, supra.

It is respectfully submitted that there is simply no substantial distinction between Phoenix, supra, and the case at bar.

B. The Judge Below Who Disagreed With This Court's Decision in Phoenix v. Kolodziejski Concurred in the Unanimous Judgment Below Because He Could Find No Basis For Distinguishing This Case From Phoenix v. Kolodziejski.

District Judge Brewster below, who concurred in the result reached by the three judge court, stated in his opinion:

"I relunctantly concur only in the judgment now being entered herein because I am unable to see a substantial distinction between this case on the one hand and City of Phoenix v. Kolodziejski, on the other. My oath of office binds me to follow the decisions of the Supreme Court of the United States, whether I agree with them or not. My own views regarding the constitutionality of restrictions on voting here involved are the same as those expressed in Kramer v.

Union Free School District, Dunn v. Blumstein, and the City of Phoenix v. Kolodziejski, supra,"[Emphasis Added], (Opinion of Judge Brewster, pp. 19a, 20a, AG Juris. State.).

Judge Brewster's final observation at the end of his opinion was as follows:

"I deeply regret that I have been unable to find a legitimate way to distinguish the cases above cited." (Concurring Opinion of Judge Brewster,p.22a, AG Juris. State.).

C. In 1970 This Court Summarily Affirmed the Judgment of a Three Judge District Court in Parish School Board of the Parish of St. Charles v. Stewart, Citing Phoenix v. Kolodziejski, on the Basis of Facts Closely Analogous to Those of the Case at Bar.

On February 25, 1970, a three judge district court within the Fifth Circuit held that Louisiana provisions restricting eligibility to vote in bond elections to property taxpayers violated the Equal Protection Clause. Stewart v. Parish School Board of the Parish of St. Charles.310 F. Supp. 1172 (EDLa....1970), aff'd mem. 400 U.S. 884 (1970). The Louisiana provisions there involved [4] required that political sub-divisions could issue bonds only if the bonds were approved by a majority in number and in amount of property of the taxpayers who voted in the election. While the requirement of approval by a majority in amount of property of the Louisiana voting classification is different from those involved in Phoenix.

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[4] See Appendix D herein for full text of those provisions.

supra and in the case at bar, the argument for upholding the classification in Stewart, supra, would be stronger than the argument for upholding the classification in Phoenix, supra, or the case at bar. This is so because in Stewart, supra, there was some attempt to make the weight of each voter's vote proportional to his potential tax liability as the result of casting his vote. On the other hand in Phoenix, supra, and in the case at bar, once a voter is on the rolls in any amount, he is permitted to vote.

The three judge panel in Stewart, supra, recognized that the term "property" as used in the challenged Louisiana provisions included personal property, and thus specifically held that the distinction between personal and real property in bond election cases is of no signficance. Moreover, the Court there took judicial notice of the fact that in Louisiana few persons pay any personal property taxes, and that those do usually pay them based upon the value of their automobile. It was there noted that while Louisiana law does provide that all property in the state is subject to taxation, that the tax assessors in fact primarily place business, commercial, and corporate personal property (merchandise inventory) on the assessment rols. Stewart, supra, at page 1173, note 3.

The same observation has been made with respect to Texas by tax experts. It has been recognized that Texas is one of a declining number of states which provide that all property is taxable unless specifically exempted by the state constitution. Yudof, "The Property Tax in Texas Under State and Federal Law", 51 Texas L. Rev. 885 at 888 (1973). Professor Yudof observed in that article that

"the net effect is that laws of Texas give little indication of the true size of the tax base. In practice personal property is rarely included - except for automobiles, which some 400 districts tax." (Yudof, supra, at page 889.)

He further observes that mortgages, savings accounts, stocks, bonds, and the whole panoply of household goods and chattels are largely untouched by the property tax. Yudof, supra, at page 889, note 27.

On November 9, 1970, this court summarily affirmed the judgment in Stewart, supra, citing City of Phoenix v. Kolodziejski, 399 U. S. 204 (1970). Parish School Board of the Parish of St. Charles vs. Stewart, 400 U. S. 884 (1970). Thus this Court has had a specific occasion to determine whether requirement of ownership of personal property would be treated any differently than a requirement of real property ownership, and has held that there is no distinction.

II. THIS COURT SHOULD SUMMARILY AFFIRM THE DECISION OF THE THREE JUDGE COURT BELOW BECAUSE APPELLANT HAS NOT RAISED A SUBSTANTIAL BASIS FOR REVERSAL IN ITS JURISDICTIONAL STATEMENT.

*(p.8) The Attorney General argues taht the issue involved in this case is important because more than one-fourth of all the states still base the right to vote in general bond elections on property ownership or taxation. In 1970, this Court specifically recognized the then remaining fourteen states which had such limitations. Phoenix v. Kolodziejski, 399 U.S. 204 at 213, note 11 (1970). The Louisiana constitutional provisions cited in that footnote have now been held unconstitutional by this Court in Parish School Board of the Parish of St. Charles v. Stewart, 400 U.S. 884 (1970), aff'g Stewart v. Parish School Board of St. Charles, 310 F. Supp. 1172 (EDLa....1970). Article 6, §3(a) of the Texas Constitution was also cited in that footnote and has been held unconstitutional by the District Court below. Thus there are no more than twelve remaining states which so limit the right to vote in bond elections.

(p.11) The Attorney General of Texas recognized the importance of the issue herein at least as early as 1969, since in that year the Attorney General adopted a dual box election procedure as a "temporary measure" for the purpose of insuring validity of bonds voted after that date. The Attorney General suggests that this temporary measure was adopted on the assumption that a fi-
(p.12) nal determination of Phoenix, supra, would put

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*Note - Page numbers in the left-hand margin herein locate specific contentions in the Attorney General's Jurisdictional Statement to which the response is being made.

the question to rest. In spite of direct and positive language in the Phoenix decision to the contrary, the Attorney General chose to believe that Phoenix did not put the question to rest. This Court's opinion in Phoenix, in reference to the fourteen states listed in note 11 therein as restricting the franchise to property owners in bond elections, stated as follows:

> Nor have we been shown that the fourteen states now restricting the franchise have unique problems that make it necessary to limit the vote to property owners." Phoenix, supra at 213.

Such language may not have been necessary to a decision of the Phoenix case, but the death knell for the challenged Texas provision was clearly sounded.

(p.12) While the Attorney General correctly states that the test applied by the District Court below was whether the challenged voter exclusions are "necessary to promote a compelling state interest", Judge Woodward's concurring opinion below makes it clear that there is another independent basis upon which the challenged provisions should be held unconstitutitonal, to-wit: the traditional rational basis equal protection test announced by this Court in Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966). On the basis of Harper, supra, Judge Woodward's concurring opinion provided:

> The ownership of property, like race, creed or color, has no relationship to one's ability to participate intelligently in the electoral processes, and a state may only limit the eligibility requirements of voters to those factors which would affect a citizen's ability to intelligently cast his vote." (Concurring Opinion of Judge Woodward below, p. 18a, AG Juris. State.).

Whether the compelling state interest test or the traditional rational basis test is employed therefore makes no difference as to the result which should be reached by this Court in the case at bar.

(p.13) The Attorney General suggests that it is immaterial to the right to vote in a bond election in Texas whether one's ownership of property be great or small. This contention is literally correct, if somewhat misleading. Ownership of property alone does not qualify anyone to vote in a bond election in Texas. Property ownership is a necessary but not a sufficient condition to voting. The voter must also have rendered at least a token amount of that property. Under Texas law, a multi-millionaire can render a ten-
(p.14) cent pencil for taxation and thereby become qualified to vote in a bond election. The Texas Attorney General suggests that this property ownership and rendition requirement is so petty, like the poll tax struck down by this Court in Harper v. Virginia State Board of Elections, supra, that it constitutes no impediment to anyone who really desires to vote. This requirement of Texas law is no more petty than the requirement of a poll tax under consideration in Harper v. Virginia State Board of Elections, supra. If the requirement is so petty as to be no impediment at all, how could that token ownership and rendition requirement be of any tax significance to a political sub-division of the State of Texas?

It may be assumed that there is some minimum value of property below which a tax assessor-collector would not render an item. Whether that value would be ten dollars, five dollars, or one cent is purely speculation. But, if there is such a minimum requirement, then this would be tantamount to saying that any citizen who desires

to vote must own and render at least that amount of property. This court forcefully and completely foreclosed the possibility of any such requirement in Harper v. Virginia State Board of Elections, supra:

> "We say the same whether the citizen otherwise qualified to vote, has a dollar fifty cents in his pocket or nothing at all, pays the fee or fails to pay it.***The degree of the discrimination is irrelevant." Harper, supra, 383 U.S. at 668 (1966).

The requirement of property ownership is confusing to many citizens who in daily life equate the term "property" with the term "real property". The Attorney General's dual box election procedure has added greatly to the confusion, and the lengthy explanations appearing in local newspapers in the City of Fort Worth prior to each bond election do nothing to clarify the situation in the minds of most voters. Many voters, upon realizing that there must be some complication requiring a two-column front page story attempting to explain who may vote, and where, must simply give up and decide not to vote. Virtually no voter can have guessed that the propery rendition requirement is merely a token requirement.

(p.15) The Texas Supreme Court in Montgomery Independent School District v. Martin, 464 S.W.2d 638 (Tex. Supp. 1971), upheld the challenged voting classification in this case for the reason that, among others, "one who is willing to vote for and impose a tax on the property of another should be willing to assume his distributive share of the burden." Montgomery, supra, 464 S. W.2d at 638. The Texas Supreme Court is mis-

taken. These Texas laws do not encourage a citizen to assume his distributive share of the tax burden. A multi-millionaire who renders a ten-cent pencil for taxation may vote, but the tax on that item is hardly his distributive share of the tax burden.

(p.18) The Attorney General alleges that only property owners will ever be called upon to repay the bonded indebtedness. That allegation would be more correctly stated that only persons who are rendering property owners during the years the bonds are paid off, not at the time of the election, plus all those who pay indirect taxes by purchasing items or services from rendering property owners, will ever be called upon to repay the bonded indebtedness. That group would contain almost everyone alive at the time of the bond election whether they were permitted to vote or not, except for those persons who have expired awaiting the final resolution of this litigation.

(p.18) The Attorney General has suggested that it is rational for the Texas Election laws to exclude non-renderers in tax bond elections since such persons have no incentive to vote either cautiously or intelligently. Thus, the Attorney General seems to concede that these laws do not meet the compelling state interest test announced by Kramer v. Union Free School District, 395 U.S. 621 (1969), Cipriano v. Houma, 395 U.S. 701, (1969) Phoenix v. Kolodziejski, 399 U.S. 204 (1970), and Parish School Board of the Parish of St. Charles v. Stewart, 400 U.S. 884 (1970), aff'g 310 F. Supp. 1172 (EDLa....1970).

(p.18) The Attorney General also suggests that non-renderers have no reason to vote against any such tax proposal. However, it would appear that the following persons would conceivably have ample

reasons for voting against such proposals:

1. Any non-renderer who anticipates owning property in the future and becoming a renderer, since tax bonds take many years to pay off;
2. Persons who have rendered property for taxation, but who do not desire to have their right to vote based upon their rendition or non-rendition of property for taxation, or who may be unwilling to state that they have property rendered for the purpose of gaining access to the voting booth;
3. Citizens who have a direct interest and concern as to whether or not the particular item for which the bond election was being held is desirable.

In the instant case, 1132, of the 4880 non-renderers voting on the library bonds voted against that proposition. (Stip. #47, p. 29d, AG Juris. State.). There is no proof on this record that those 1132 non-renderers had "no reason" for voting against the proposition. It is reasonable to assume that such persons were, in fact, quite intelligent and realized that their vote would increase the tax burden upon themselves as well as all other citizens of the City of Fort Worth. Moreover, this Court noted in Phoenix, supra, that "... those persons excluded from the franchise have a great interest in approving or disapproving municipal improvements..." Phoenix, supra, 399 U. S. at 210 [Emphasis added].

(p.18) The Attorney General's assertion that the Texas Election laws create a minimum qualification requirement which serves to protect and enhance the electoral process is belied by his

failure to point out how the electoral process is protected or enhanced. What quality does a rendering property owner have which makes him uniquely qualified to determine whether the City of Fort Worth shall build a $6.8 million library?

(pp.20, 21,22) The Attorney General has suggested Salyer Land Co. v. Tulare Lake Basin Water Storage District, 419 U.S. 719 (1973) as authority for refusing to apply the compelling state interest test in the case at bar. That case is distinguishable in several fundamental ways from both the case at bar and Phoenix, supra. The Water Storage District involved in Salyer Land Co., supra, had as its primary purpose the acquisition, storage, and distribution of water for farming. The District had no other general services which it provided such as schools, housing, transportation, utilities, roads, or any other type of service ordinarily furnished or financed by a municipality. Therefore, the restriction of the franchise to land owners within the District had the effect of limiting the ballot to those persons primarily affected by the outcome of the election. In the case at bar, as well as in Phoenix, by no reach of the imagination can it be suggested that the property ownership requirement restricted the vote to persons primarily interested in the outcome of the election. No logic or experience indicates that only property owners have a significant interest in such things as libraries, parks, police and public safety buildings, playgrounds and sewer systems.

Moreover, in Salyer, supra, all the costs of the District's projects were assessed against the land in proportion to the benefits received. Just the opposite obtains in the case at bar. The Texas classification scheme in no way distributes the burden of taxation proportionately between those who receive the most and the least

benefit from the outcome of the election, or from the operation of the issue voted on in the election. In fact, it permits a rendering property owner to vote without ever paying any tax whatsoever. Neither failure to pay the tax nor tax delinquency has any disqualifying effect under Texas law. Thus, this Court in Salyer held that, by reason of the Water District's special limited purposes and its disproportionate effect upon the activities of land owners as a group, the statute there involved did not violate the Equal Protection Clause. Also, Salyer, supra, did not involve a bond election but rather involved the election of directors to the Board of Governors for the Water District.

(p.22, 23) The Attorney General suggests Associated Enterprises Inc. v. Toltec Watershed Improvement District, 410 U.S. 743 (1973), decided the same day as Salyer, supra, as a basis for this Court refusing to apply the compelling state interest test. That case is also clearly distinguishable from Phoenix, supra, and the case at bar, since, like Salyer, supra, it involved a special purpose district which had a disproportionate effect on landowner's as such within the district. The operation of the watershed district in that case was conducted through special projects, assessments being made on the land for any benefits received, and such assessments constituting a lien upon the land itself until paid. The persons primarily affected by the outcome of the election were clearly and easily identifiable. These same persons were also liable for payments in direct proportion to the benefit they received. This court held that the state could rationally give landowners the exclusive right to vote.

(p.23) The Attorney General has asserted that the only distinction between the non-landowner resident's relationship to the elections in Salyer and Associated Enterprises compared with the relationship of the non-rendering appellees to the tax bond election is the difference between a "special purpose district' and a special purpose bond election. That assertion of the Attorney General is demonstrably false. The classificatory schemes involved in Salyer and Associated Enterprises successfully identified and isolated those persons who were almost exclusively affected by the operations of the special purpose district, to-wit: landowners. If there were to be an analogy between Salyer amd Associated Enterprises and the case at bar, then the Texas classificatory scheme would have to somehow limit the franchise to those persons almost exclusively affected by the outcome of the bond election. It does not do so. There is simply no manner, rational or irrational, in which property ownership or rendition of property for taxation may be related to the use of a public library.

(p.23, 24) The Attorney General urges this Court's decision in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) as a basis for urging this Court to apply the traditional rational basis test in the case at bar, since this Court there decided to "restrain the expansion" of the fundamental rights analysis in equal protection cases. If use of the compelling state interest test in the case at bar constitutes an "expansion" of the analysis of this Court in Phoenix, supra, why has the Attorney General not suggested to this Court in what respect an application of that test herein would constitute an "expansion"? As pointed out above in Point I. A. above, there is simply no substantial distinction between Phoenix, supra, and the case at bar, and application of the

compelling state interest test to the case at bar could not conceivably be viewed as an "expansion" of the fundamental rights analysis. However, the failure of this Court to apply the compelling state interest test in the case at bar would overrule this Court's decisions in Phoenix, supra, Kramer, supra, Cipriano, supra, and Stewart, supra.

If the Attorney General is urging this Court to overrule those four cases, he should say so.

(p. 27) The Attorney General has asserted that Judge Thornberry, author of the memorandum opinion below, fails to consider that the general obligation tax bond election in Texas will have a direct and disproportionate effect on property owners. He cites Salyer, supra, as the authority for that proposition. Salyer, supra, simply is not analagous, since in that case virtually the only thing affected by the election was land. In general obligation tax bond elections, land and property is one of the least significant things affected. The most significant thing affected is people. Additionally, the Attorney General's analysis makes no allowance whatsoever for the indirect payment of taxes.

(p.27) The Attorney General has suggested that one of the important facts to this Court in Salyer, supra, was that lessees could bargain with their lessors for the franchise by proxy. Is the Attorney General suggesting that there is some provision in Texas law which permits voting by proxy in general obligation tax bond elections? If he is, he should cite the relevant provisions to this Court. Counsel for appellees have uncovered no such provisions.

(p.29) If the Attorney General desires for this Court to apply the rational basis test in deciding the case at bar, why does he not devote at least two paragraphs in his Jurisdictional Statement to discussing the rational basis test set forth in Harper under the facts of the instant case? It is respectfully submitted that his failure to do so is based upon his realization that even under the traditional rational basis test, these challenged Texas provisions would completely fail to pass constitutional muster. These restrictions have no relationship whatsoever to the intelligent use of the ballot. Judge Woodward below specifically based his concurrance upon Harper, supra, in which this Court struck down a poll tax under the rational basis standard for the reason that such tax bore no relationship to the intelligent use of the ballot. Neither does property ownership.

III. THIS COURT SHOULD SUMMARILY AFFIRM THE DECISION OF THE THREE JUDGE COURT BELOW BECAUSE THAT DECISION IS SO CLEARLY CORRECT THAT THERE IS NO POSSIBILITY THAT THIS COURT WOULD BE INDUCED TO REVERSE.

A. The Texas Supreme Court has Upheld the Constitutionality of the Voting Classification Challenged in This Case in the Face of This Court's Decisions of Kramer v. Union Free School District and Phoenix v. Kolodziejski.

In Montgomery Independent School District v. Martin, 464 S.W.2d 638 (Tex. Sup. 1971) the Texas Supreme Court held that the Texas laws being attacked in the present case are not violative of the Equal Protection Clause of the Fourteenth Amendment. The opinion of the Court does not analyze whether the voting classification bears any relation to voter qualifications,[5] nor does it analyze whether the voting classification is necessary to promote a compelling state interest,[6] which are the

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[5]"But we must remember that the interest of the State, when it comes to voting is limited to the power to fix the qualifications. Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process." Harper v. Virginia State Board of Elections, 383 U.S. 663 at 668 (1966).

[6]"Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest." Kramer v. Union Free School District, 395 U.S. 621 at 627 (1969).

applicable constitutional standards.[7] Two purposes of the voting classification are set forth in the opinion:

(1) to limit the franchise to those who will pay for the obligations assume in the election,[8] and

(2) to encourage disclosure and rendition of taxable property.[9]

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[7]The tradtional "rational basis" standard is not applicable to this case, Kramer v. Union Free School District, 395 U.S. 621 at 628 (1969).

[8]"One who is willing to vote for and impose a tax on the property of another should be willing to assume his distributive share of the burden. ... To allow some property owners to vote in that kind of an election, and at the same time to permit them to avoid their fair share of the resulting obligation, would confer preferential rights. This would be a denial of equal protection to another segment of citizens." Montgomery Independent School District v. Martin, 464 S.W.2d 638 at 641, 642 (Tex. Sup. 1971).

[9]"In our opinion, the requirement that the voter in a general obligation bond election must get his property on the rolls is in the interest of sound government and affords equal treatment to all citizens. ... This is the manner in which the Texas Constitution, as approved by the entire citizenry of the State, provides inducement for those who wish to participate in the decision making process in a School District to assume their rightful portion of the burden they help to create.

Personal property such as stocks, bonds, cash, automobiles, and livestock furnishes a great deal of the State's taxable property. No class of property is so susceptible to concealment and escapte from taxation as personal property. ... There may be other means to reach personal property, but

The only other conceivable state interest arguably promoted by the classification is to limit the franchise to those who are primarily interested in the outcome of the election.

B. The Challenged Provisions of Texas Law are not Entitled to a Presumption of Constitutionality.

The clear mandate of Kramer v. Union Free School District, 395 U.S. 621 (1969) is that these challenged Texas provisions are not entitled to the general presumption of constitutionality afforded state laws.[10]

C. None of the Purported Purposes of the Texas Voting Classification Meet the Constitutional Standard Laid Down by This Court in Harper v. Virginia State Board of Elections.

The constitutional standard of Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966) is best stated in the language of its opinion:

> "But we must remember that the interest of the State, when it comes to voting is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one's ability

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experience has shown that every means must be pressed into service if the obligations of government are to be spread equally." Montgomery Independent School District v. Martin, 464 S.W.2d 638 at 641 (Tex. Sup. 1971).

[10] Kramer v. Union Free School District, 395 U.S. 621 at 627, 628 (1969)

> to participate intelligently in the electoral process." Harper v. Virginia State Board of Elections, supra, 383 U.S. 668 (1966).

1. Texas has no right to encourage disclosure and rendition of taxable property by conditioning the right to vote upon such disclosure and rendition, because that purpose bears no relation to voter qualifications.

It is undoubted that a state has the right to encourage disclosure and rendition of taxable property, just as it has the right to promote highway safety by appropriate legislation. But this does not mean a state is free to withhold the right of its citizens to vote in order to enforce these goals.

In Harper v. Virginia State Board of Elections, supra, this Court held that a state does not have the right to impose a tax on the right to vote because "(v)oter qualifications have no relation to wealth nor to paying or not paying this or any other tax." 383 U.S. 666. Disclosure and rendition of taxable property has no more relation to voter qualifications than does wealth, highway safety, building codes, or any number of other topics in which the state is otherwise legitimately interested. A state simply is not free to clutter up the voting laws with requirements which have no relation to voter qualifications.

2. Texas has no right to limit the franchise to those who will pay for the obligations assumed in the bond election because this purpose bears no relation to voter qualifications.

The fact that a person may or may not have to pay the taxes which fund an issue on which he is voting may influence how he wishes to vote. But it has no bearing on his ability to intelligently participate in the electoral process. Therefore, this purpose also fails to meet the constitutional standard of Harper v. Virginia State Board of Elections, supra.

3. Texas has no right to limit the franchise in bond elections to those who are primarily interested in the outcome of the election because this purpose bears no relation to voter qualifications.

Assuming arguendo that the challenged voting classification does somehow roughly limit the franchise to those primarily interested in the outcome of an election, that purpose bears only a speculative relationship to the ability or potential of a person to exercise his franchise intelligently. It may be generally true that persons primarily interested in the outcome of an election exercise more care in the casting of their vote, but this certainly does not mean that persons no primarily interested are incapable of exercising their franchise intelligently. For example, a Fort Worth resident voting in a statewide election on a proposition to abolish a hospital district in Waco certainly is "one not primarily interested in the outcome" of such election. But this in no way implies that the voter is incapable of casting an informed, intelligent ballot.[11]

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[11]The State law which requires a statewide election in such cases is anamolous. Perhaps the Fort Worth resident shouldn't have a vote on such a proposition. But that is because he doesn't reside in or come under the control of such hospital district, and not because he is incapable of casting an intelligent ballot.

4. In deciding whether the Texas voter classification meets the constitutional standard of Harper v. Virginia State Board of Elections, the degree of discrimination is irrelevant.

The Texas Supreme Court has stated that the challenged voting scheme is no impediment to anyone who really wants to vote.[12] This argument was emphatically answered in Harper v. Virginia State Board of Elections, supra:

> "We say the same whether the citizen, otherwise qualified to vote, has $1.50 in his pocket or nothing at all, pays the fee or fails to pay it." 383 U.S. 668.[13]

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[12]"It is the contention of the Attorney General, and we agree, that voter qualifications of ownership under the Texas constitutional and statutory provisions stated above, as interpreted by our decisions, are so universal as to constitute no impediment to any elector who really desires to vote in a bond election. A voter is qualified if he renders any kind of property of any value, and he need not have actually paid the tax." Montgomery Independent School District v. Martin. 464 S.W.2d 638 at 640 (Tex. Sup. 1971).

[13]"To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant." Harper v. Virginia State Board of Elections, supra, 383 U.S. 668 (1966).

D. The Only Three Conceivable Purposes of the Texas Voting Classification Fail to Meet the Constitutional Standard Laid Down by This Court in Kramer v. Union Free School District.

This Court announced a strict standard for measuring state action in elections in Kramer v. Union Free School District:

> "(I)f a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest." Kramer v. Union Free School District, 395 U.S. 621 at 627 (1969).

It should be observed that this standard has two distinct requirements:

(1) there must be a compelling state interest for the classification; and

(2) the classification must be necessary to promote that compelling state interest.

Thus, in order to decide whether or not these five Texas provisions are consistent with the Equal Protection Clause of the Fourteenth Amendment, we must answer one or both of the following questions:

(1) is there a compelling state interest for the classifications made by these five provisions?

(2) even if there is, is the classification adopted necessary to promote that compelling state interest?

1. The interests of the state in encouraging its citizens to disclose and render for taxation some property, however little, is not a compelling state interest.

It is perfectly clear that the challenged Texas provisions do not require the voter to assume his pro rata share of the tax burden in order to vote.

> A voter is qualified if he renders any kind of property of any value, and he need not have actually paid the tax. Montgomery Independent School District v. Martin, 464 S.W. 2d 638 at 640 (Tex. Sup. 1971).[14]

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[14] There is however some language in the same opinion indicating that the challenged provisions do encourage each citizen to assume his fair sahre of the tax burden.

> "To disclose one's share of the total burden for which he is responsible in a bond election requires no more than the law universally expects. To allow some property owners to vote in that kind of an election, and at the same time permit them to avoid their fair share of the resulting obligation, would confer perferential rights." 464 S.W.2d 641, 642.

This language cannot be reconciled with the language of the Court in that case quoted in the text.

The interest of the State in securing disclosure and rendition for tax purposes of a thirty-cent pencil is something less than compelling. The cost of accounting for such an item probably exceeds the tax that can be collected.

2. The challenged Texas voting classification is not necessary to promote the state interest, if any, of encouraging each citizen to disclose and render for taxation some of his property.

A law which exacts a monetary penalty for failure to render property for taxation is an appropriate and recognized technique for collecting taxes. Employment of a tax-collector assessor to discover and render taxable property is another recognized way to collect taxes. Both of these means are tailored to the end sought to be accomplished. Voting laws are not designed primarily to collect taxes, but are designed to give the citizen a voice in his government. Since there are other, better ways to encourage rendition of taxable property, these voting laws are certainly not necessary to promote that goal.

It is difficult to assess how many persons who otherwise would not render some property for taxation are persuaded to render taxable property by these Texas laws. The number of such persons is probably not very great. There are surely many more persons whose uncertainty over the property rendition requirements keeps them from the polls. Since these voting laws largely fail to encourage rendition of taxable property, they are not necessary to promote that goal.

3. The interest of the state in limiting the franchise to those who will pay for the obligations assumed in the election is not a compelling state interest.

The five Texas provisions attacked in this suit disenfranchise many voters who are directly affected by the results of the elections which are held pursuant to the challenged provisions. The bond election held on April 11, 1972, was for the purpose of submitting two propositions to the electorate:

Proposition 1 ..... $ 3,000.000
(Transportation System Bonds)

Proposition 2 ..... $ 6,860,000
(Library Bonds)

Certainly there is no compelling reason to adopt a classification which keeps otherwise qualified voters from voting on matters such as these. Each of these improvements vitally affects all the residents of Fort Worth. Most bond elections do affect all residents. Thus, while the Constitution and Statutes of Texas attempt to enfranchise only a limited class of voters in this type of election, it in no way limits the subject matter of the elections to matters concerning only those allowed to vote.

It is true that those who must pay the taxes for the improvements do have a special interest apart from the general public, but the Court in Stewart v. Parish School Board of St. Charles, 310 F. Supp. 1172 (1970) aff'd mem., 400 U.W. 884 (1970) held that the special interests of property taxpayers is not a compelling state interest. 310 F. Supp. at 1181.

4. The classification challenged herein is not necessary to promote the state's interest, if any, of limiting the franchise to those who will pay for the obligations assumed in the election.

The Texas provisions disenfranchise many persons who will have to pay for the improvements voted on. There are many persons otherwise qualified to vote who will not have rendered property for taxation in the year of the election, but who will render property in future years. The tax on that property will be applied to the retirement of the bonds. There are other people who will effectively pay property tax in the form of rent, or overhead added to a seller's cost of goods sold. There are still others who will be deterred from voting because although they have rendered some property, they do not understand that these provisions of Texas law require only token rendition of taxable property as a condition to the right to vote.

The voting laws is no place to require token compliance with the legitimate objective of tax collection, and it is certainly no place for such token compliance when, as here, the law limits the right to vote in an imprecise and easily misunderstood fashion.

Clearly, there is a large amount of overkill in these provisions. These provisions are not necessary to promote the state interest of limiting the vote to those who will, in the long run, pay for the obligations. Indeed, these provisions do not even reasonably promote that interest.

5. The interest of the state in limiting the franchise to those who are primarily interested in the outcome of the election is not a compelling state interest.

Even though there is no hint that the challenged voting classification even begings to limit the franchise to those primarily interested

in the outcome of the election, such a purpose is not a compelling one.

This is the same state interest suggested in Kramer v. Union Free School District, supra, and this Court there held that the New York statute was not necessary to promote that interest since many persons vitally interested in the issues voted on were disenfranchised. 395 U.S. 632, 633.

The Court in Stewart v. Parish School Board of St. Charles, 310 F. Supp. 1172 (1970), aff'd mem. 400 U.S. 884 (1970), held that the special interests of property taxpayers is not a compelling state interest. 310 F. Supp. 1181.

The challenged Texas provisions suffer precisely the same infirmity, since the bond elections governed by the five Texas provisions are of vital concern to all voters. These bonds can be used to finance virtually any governmental function.

6. The challenged voting restrictions are not necessary to promote the state's interest, if any, of limiting the franchise to those who are primarily interested in the outcome of the election.

It is difficult to even make an argument that the challenged voting classification limits the franchise, even imprecisely, to persons who are primarily interested in the outcome of the election. Under the facts of the present case, a person who has no property rendered for taxation may have children who would be benefited to a great extent by the building of a new library or the improvement of existing facilities. And as has already been pointed out, even though this voter may have no property rendered for taxation, if he pays rent on his house or any other property which is taxable

in Texas, he is in effect paying the tax without having any property rendered. Indeed, by paying the tax he has done more to fulfill the state's objective of tax collection than a person meeting the minimum requirement for voting in a bond election. A renderer need not have paid any tax in order to vote. To say that a person is less interested, or is not primarily interested, in the outcome of an election such as the one held in this case simply is not true. The further difficulty with such an argument is that any attempt to decide by whatever means who is "primarily interested" in the outcome of an election for something of as much general interest as a library is necessarily highly subjective and speculative.

It is respectfully suggested that the challenged voting classification is not necessary to limit the franchise to persons primarily interested in the outcome of the election. Indeed, it doesn't even begin to so limit the franchise.

E. The Clear Mandate of Kramer v. Union Free School District and the Three Cases Subsequently Based Upon It is That These Five Texas Provisions Are Unconstitutional.

In Kramer v. Union Free School District, supra, this Court struck down a provision of the New York Education law which required a voter in school board elections to be either a parent of a child attending school in the district, or the owner or lessee of real property, or the spouse of an owner or lessee.[15]

In Cipriano v. City of Houma, 395 U.S. 701 (1969), a companion

[15]See Appendix A for a full text of the statute.

case to Kramer v. Union Free School District, this Court held unconstitutional a Louisiana statute which limited the right to vote in utility revenue bond elections to "property owners".[16]

In Phoenix v. Kolodziejski, 399 U.S. 204 (1970) this Court held unconstitutional Arizona statutes and constitutional provisions which limited the right to vote in general obligation bond elections to real property taxpayers.[17]

In Stewart v. Parish School Board of St. Charles, 310 F. Supp. 1172 (1970) aff'd mem., 400 U.S. 884 (1970), a three-judge district court withing the Fifth Circuit held that Louisiana constitutional and statutory provisions limiting the right to vote in general obligation bond elections to "property taxpayers" were unconstitutional.[18] The term "property taxpayers" included those who pay tax on personal property. This Court affirmed the judgment of the three-judge court in a memorandum opinion, citing Phoenix v. Kolodziejski, supra.

The Kramer doctrine has been applied by the Federal Courts in every subsequent case where the issue of restriction of the franchise in bond elections to property taxpayers has been raised.[19]

[16]See Appendix B for a full text of this Louisiana statute.

[17]See Appendix C for a full text of the Arizona provisions.

[18]See Appendix D for a full text of these provisions.

[19]Neither Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973) nor Associated Enterprises, Inc. v. Toltec Watershed Improvement District, 410

Without fail, the Courts have held the challenged state provisions unconstitutional. It will be necessary for this Court to overrule Kramer, Phoenix, Cipriano, and Stewart, supra, if these Texas provisions are to be held constitutional.

On June 23, 1970, this Court announced its decision in Phoenix v. Kolodziejski, 399 U.S. 204 (1970). This Court there held that a 1969 bond election in which the franchise was reserved to property owners was void. Issuance of those bonds was enjoined. In that opinion, this Court stated:

> "***Nor have we been shown that the fourteen states now restricting the franchise have unique problems that make it necessary to limit the vote to property owners." Phoenix v. Kolodziejski, 399 U.S. 212-213 (1970).

Texas is one of those fourteen states.

In the face of the Phoenix decision, the Texas Supreme Court has squarely held that the Texas voting scheme challenged in this suit is not violative of the Equal Protection Clause of the Fourteenth Amendment. Montgomery Independent School District v. Martin, 404 S.W.2d 638 (Tex. Sup. 1971).

U.S. 743 (1973) involved bond elections. More fundamentally, both of such cases basically held that when land is virtually the only thing affected by an election, and the impact of the election on land alone is clear, then the franchise may be restricted to real property owners. See II above pp. 26-28.

Since virtually the complete record in this case is before the Court and all evidentiary matters are undisputed, this Court should affirm on the merits without briefing, oral argument, or further hearing.

> "For to repeat, wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened and conditioned." Harper v. Virginia State Board of Elections, 383 U.S. 663 at 670 (1966).

CONCLUSION

Therefore, the Texas classificatory scheme limiting the right to vote in general obligation bond elections to rendering property owners is unconstitutional.

PRAYER

Wherefore, Appellees pray as follows:

1. That this Court decide the case without briefing, oral argument, or further hearing, and,

2. That this Court affirm the judgment of the three judge district court below.

RESPECTFULLY SUBMITTED,

LAW OFFICES OF DON GLADDEN
702 Burk Burnett Building
Fort Worth, Texas 76102

BY: _____
DON GLADDEN

_____
MARVIN COLLINS

PROOF OF SERVICE

The undersigned, a member of the Bar of this Court, hereby certifies that a copy of the foregoing Motion has this the 26th day of April, 1974, been served upon each counsel of record for appellees, in accordance with Rule 33 of this Court, by depositing the same in a United States mail box, with first class postage prepaid, addressed to said counsel at their post office addresses.

_____
DON GLADDEN

APPENDIX A: NEW YORK STATUTES INVOLVED IN KRAMER V. UNION FREE SCHOOL DISTRICT

1. Section 2012, New York Election Law.

A person shall be entitled to vote at any school meeting for the election of school district officers, and upon all other matters which may be brought before such meeting, who is: 1. A citizen of the United States. 2. Twenty-one years of age. 3. A resident within the district for a period of thirty days next preceding the meeting at which he offers to vote; and who in addition thereto possesses one of the following three qualifications:

(a) Owns or is the spouse of an owner, leases, hires, or is in the possession under a contract of purchase or is the spouse of one who leases, hires or is in possession under a contract of purchase of, real property in such district liable to taxation for school purposes, but the occupation of real property by a person as a lodger or boarder shall not entitle such person to vote, or

(b) Is the parent of a child of school age, provided such a child shall have attended the district school in the district in which the meeting is held for a period of at least eight weeks during the year preceding such school meeting, or

(c) Not being the parent, has permanently residing with him a child of school age who shall have attended the district school for a period of at least eight weeks during the year preceding such meeting. No person shall be deemed to be ineligible to vote at any such meeting, by reason of sex, who has the other qualifications required by this section.

APPENDIX B: LOUISIANA STATUTES INVOLVED IN CIPRIANO V. HOUMA

1. Article 39: 501 LA. STAT. ANN.

Elections. Except as otherwise provided in special cases, no subdivision may incur any debt, issue any bonds, levy any special tax, or assume any indebtedness unless it has been authorized by vote of a majority in number and amount of the property taxpayers qualified to vote under the constitution and laws of this state who vote at an election hereunder. The governing authority of any subdivision may call a special election for any of these purposes at any time; and it shall call an election for any of these purposes when requested so to do by the petition in writing of one-fourth of the property taxpayers eligible to vote at the election.

2. See Also
Article 33: 4258 LA. STAT. ANN.

Election to authorize the issuance of bonds; validation. Before the resolution authorizing the issuance of bonds under this Subpart is adopted by the governing body, the question of the issuance of the bonds shall be submitted and approved at either a special or general election which shall be ordered, conducted and canvassed in accordance with either of the following election procedures, at the discretion of the governing body;

(1). The question of the issuance of the bonds may be submitted to and approved by votes of a majority in number and amount of the property taxpayers who vote at an election held hereunder. In the event the governing body elects to order a property taxpayers' election, all matters pertaining thereto, including the qualifications of voters and the manner of calling and conducting the election

and canvassing and promulgating the results thereof shall be governed by the provisions of Chapter 4, Subtitle II, Title 39.

(2). The question of the issuance of the bonds may be submitted to and approved by a majority of the qualified electors of the municipal corporation who vote at an election held therein substantially in accordance with the general election laws of the state of Louisiana except that the election shall be ordered, conducted, canvassed and notice thereof published by the governing body in accordance with the procedures set forth in Chapter 4, Subtitle II, Title 39, except where inconsistent with the provisions of this section. In the event the governing body elects to order such an election, all qualified resident electors shall be entitled to vote in the election and voters shall not be required to sign a ballot. Voting machines shall be used in the holding of this type of election and assessed valuation shall not be voted in the election.

In the event a property taxpayers' election has heretofore been held and promulgated approving the issuance of bonds under this Subpart, as contemplated in Subparagraph (1) above, the governing body may proceed with the issuance and sale of such bonds without complying with the provisions of this section and without any further election approval.

All bonds heretofore issued under the provisions of this Subpart are hereby validated, ratified and confirmed and declared to be valid and binding obligations of the municipal corporation in accordance with the terms of their issuance in spite of any one or more irregularities which may have occurred in the passage of this Subpart or question which might be raised as to the constitutionality of any procedural provision of this Subpart. All proceedings heretofore had in connection with the

issuance of such bonds are hereby ratified, validated and confirmed.

3. See Also
Article 39.508 LA. STAT. ANN.

Qualifications of voters. Only property taxpayers qualified as electors under the constitution and laws of this state are entitled to vote in any election held under the provisions of this Part. The qualifications of taxpayers as voters are those of age, residence, and registration as voters, without regard to sex. There shall be no voting by proxy.

With reference to Part IV of this Chapter if the limits and boundaries of any municipal corporation has been extended and the assessment roll that is to include the property in the extended limits has not already been made for the municipal corporation, those who have become property taxpayers by the extension of the limits and who are otherwise qualified to vote shall be permitted to vote in the election and the assessed valuation of their property shall be ascertained by reference to the last assessment roll of the parish.

APPENDIX C: ARIZONA STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED IN PHOENIX V. KOLODZIEJSKI

1. Article 7, Section 13 ARIZ. CONST.

Submission of questions upon bond issues or special assessments.

Questions upon bond issues or special assessments shall be submitted to the vote of real property taxpayers, who shall also in all respects be qualified electors of this State, and of the political subdivisions thereof affected by such question.

2. Article 9, Section 8 ARIZ. CONST.

Local debt limits; assent of taxpayers. No county, city, town, school district, or other municipal corporation shall for any purpose become indebted in any manner to an amount exceeding four per centum of the taxable property in such county, city, town, school district, or other municipal corporation, without the assent of a majority of the property taxpayers, who must also in all respects be qualified electors, therein voting at an election provided by law to be held for that purpose, the value of the taxable property therein to be ascertained by the last assessment for State and county purposes, previous to incurring such indebtedness; except, that in incorporated cities and towns assessments shall be taken from the last assessment for city or town pruposes; Provided, that under no circumstances shall any county or school district become indebted to an amount exceeding ten per centum of such taxable property, as shown by the last assessment roll thereof; and Provided further, that any incorporated city or town, with such assent, may be allowed to become indebted to a larger amount, but not exceeding fifteen per centum additional, for supplying such

city or town with water, artificial light, or sewers, when the works for supplying such water, light, or sewers are or shall be owned and controlled by the municipality.

3. Section 9-523 ARIZ. STAT. ANN.

Bond election. Questions on bond issues under this article shall be submitted to the qualified electors of the municipality. No bonds shall be issued without the assent of a majority of the qualified electors voting at an election held for that purpose as provided in this article.

4. Section 35-452 ARIZ. STAT. ANN.

Election to authorize indebtedness; qualifications of electors.

A. The governing body or board of a political subdivision enumerated in Section 35-451 may, and upon petition signed by fifteen per cent of its real property taxpayers who are qualified electors thereof shall, order an election by such taxpayers and electors to determine whether such indebtedness shall be authorized.

B. The order for the election in a school district shall be made by the board of supervisors in the county where such election will be held, either upon petition or upon request of the board of school trustees.

C. If a majority of the real property taxpayers who are qualified electors voting at the election vote in favor of creating an indebtedness in an amount exceeding four per cent of the value of the taxable property of the political subdivision, such political subdivision may become so indebted.

5. Section 35-455 ARIZ. STAT. ANN.

Issuance and sale of bonds; call for election.

A. When the political subdivision designated in this article desires to issue bonds or other evidences of indebtedness, the governing body or board thereof may, with assent of a majority of the real property taxpayers who are qualified electors therein voting at the election held as provided by Section 35-454, issue and sell bonds in the amount authorized at the election.

B. The call for the election shall set forth the amount of each bond and the aggregate amount of the bonds, the maximum rate of interest to be paid thereon, when the interest is payable, the number of years such bonds or any series thereof are to run from the date of such bonds or series and the purposes for which the money derived from the sale of the bonds will be expended.

APPENDIX D: LOUISIANA STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED IN PARISH SCHOOL BOARD OF THE PARISH OF ST. CHARLES V. STEWART

1. Article 14, Section 14a LA. CONST.

Municipal corporations, parishes and school, road, subroad, sewerage, drainage, subdrainage (waterworks and sub-waterworks) districts, hereinafter referred to as subdivisions of the State may incur debt and issue negotiable bonds, when authorized by a vote of a majority in number and amount, of the property taxpayers qualified to vote under the Constitution and laws of this State, who vote at an election held for that purpose after notice published or posted for thirty (30) days in such manner as the Legislature may prescribe, and the governing authorities of such subdivisions shall impose and collect annually, in excess of all other taxes, a tax sufficient to pay the interest annually or semi-annually and the principal falling due each year, or such amount as may be required for any sinking fund necessary to retire said bonds at maturity.

2. Article 39-508, LA. STAT. ANN.

Qualifications of voters. Only property taxpayers qualified as electors under the constitution and laws of this state are entitled to vote in any election held under the provisions of this Part. The qualifications of taxpayers as voters are those of age, residence, and registration as voters, without regard to sex. There shall be no voting by proxy.

With reference to Part IV of this Chapter if the limits and boundaries of any municipal corporation have been extended and the assessment roll that is

to include the property in the extended limits has not already been made for the municipal corporation, those who have become property taxpayers by the extension of the limits and who are otherwise qualified to vote shall be permitted to vote in the election and the assessed valuation of their property shall be ascertained by reference to the last assessment roll of the parish.

Supreme Court, U. S.
FILED
NOV 26 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

* * *

NO. 73-1723

* * *

JOHN L. HILL,
ATTORNEY GENERAL OF TEXAS,
Appellant

V.

MICHAEL L. STONE, ET AL.,
Appellees

* * *

On Appeal from the United States District Court for the Northern District of Texas

* * *

BRIEF FOR THE APPELLANT

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 73-1723

JOHN L. HILL, Attorney General of Texas
Appellant,

v.

MICHAEL L. STONE, et al.,
Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF FOR THE APPELLANT

THE OPINIONS BELOW

The opinion of the three-judge federal court sitting as the District Court for the Northern District of Texas, Fort Worth Division, (J.S. 5a-27a) is reported at 377 F.Supp. 1016 (1974).

JURISDICTION

The judgment of the three-judge federal court declaring certain laws of the State of Texas unconstitutional, empaneled pursuant to 28 U.S.C. Sections 2281 and 2284, was entered on March 25, 1974, (J.S. 1a - 4a). Notice of Appeal was filed by Appellant on April 18, 1974 (J.S. 1b). On April 25, 1974, this Court granted Appellant's application for a partial stay. The appeal was docketed on May 17, 1974, and probable jurisdiction noted on October 15, 1974. The jurisdiction of this Court to review this

decision by direct appeal is conferred by 28 U.S.C. Sections 1253 and 2101(b).

QUESTION PRESENTED BY THE APPEAL

The following question is presented by this appeal:

> Are Texas election laws limiting the franchise in general obligation tax bond elections to persons who own taxable property which has been rendered for taxation consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

CONSTITUTIONAL AND STATUTORY LAWS INVOLVED

The validity of Art. VI, Sections 3 and 3a, Tex. Const., Articles 5.03, 5.04(a) and 5.07, Tex. Election Code and the Charter of the City of Fort Worth, Ch. 25, Section 19, are here involved. (J.S. 1c - 6c).

STATEMENT OF THE FACTS OF THE CASE

Article VI, Section 3a (J.S. 1c) of the Texas Constitution provides that voters voting on bond issues which will be paid in whole or in part from tax revenues must be "only qualified electors who own taxable property in the . . . political subdivision. . .where such election is held, and who have

duly rendered the same for taxation, . . ." In 1969, when it first became apparent from the decisions of this Court in Cipriano v. Houma, 395 U.S. 701 (1969), and Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969), that the above and related provisions of the Texas Constitution and Statutes might be incompatible with the United States Constitution, the Texas Attorney General's Office, and the bond industry and their attorneys, devised a dual-box election procedure whereby at each tax bond election two separate ballot boxes are provided (App. 65-67). In one box only resident qualified electors who own taxable property and who have duly rendered the same for taxation are allowed to vote, and in the other box, all other resident qualified electors (who are otherwise qualified, but do not own taxable property which has been duly rendered for taxation) are allowed to vote. The votes cast in each box are recorded separately, and the returns are canvassed in such manner as reflects separately the votes cast by the two respective groups of electors.

Bonds have only been approved by the Texas Attorney General if a majority of the property owners who have rendered their property approved, and if additionally, a majority of all voters approved. This procedure assured that bonds issued were compatible with both the Texas Constitution and the United States Constitution. The dual-box election procedure was followed in the general obligation tax bond election made the subject of this case (App. 65-67, 74).

On April 11, 1972, the City of Fort Worth

held a tax bond election to seek authorization to issue bonds to build a library system (App. 86). The ordinance authorizing the election stated that the election was to ". . . be held and conducted, in effect, as two separate but simultaneous elections, to-wit: one election at which only the resident, qualified electors who own taxable property in the City and who have duly rendered the same for taxation shall be entitled to vote on said propositions, and another election at which all other resident, qualified electors of the City shall be entitled to vote on said propositions. The votes cast at each of said separate but simultaneous elections shall be recorded, returned, and canvassed separately." (App. 64)

The result of the election was as follows (App. 53-54, 86-87):

OWNERS OF PROPERTY
RENDERED FOR TAXATION

FOR	10,849
AGAINST	12,234

NON-RENDERERS

FOR	3,758
AGAINST	1,132
TOTAL FOR	14,607
TOTAL AGAINST	13,366

On April 17, 1972, the City Council approved and adopted the election (App. 53-54) and, thereafter, acting pursuant to the Texas election laws, refused to sell the library bonds. On that same day, the appellees filed a class action pursuant to Rule 23, F.R. Civ. P. requesting that a three-judge district court be convened under the authority of 28 U.S.C. Sections 2281 and 2284 (App. 11-12).

John L. Hill, Attorney General of Texas, was joined as defendant because Texas law requires that said official certify the legal validity of the proposed municipal bond issue (App. 33, 51). V.T.C.S. Art. 709d (App. 49-50). After the bonds have been approved by the Attorney General, Texas statutes provide that they are incontestable except for fraud and unconstitutionality.

Appellees requested the District Court to declare the Texas election laws involved to be in irreconcilable conflict with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (App. 16-17). Appellees further requested the District Court to enjoin appellants from giving any force or effect to the Texas election laws in controversy as they might relate to the outcome of the bond election held on April 11, 1972, or any other such elections thereafter held (App. 17-20).

The case was submitted to the District Court on stipulated facts as they appeared in pages 19 through 43 of the District Court's Pre-Trial Order entered on November 8, 1972 (App. 38-87).

On March 25, 1974, the three-judge court entered a judgment and opinion (J.S. 1a - 27a)

declaring the questioned Texas election laws to be in violation of the Fourteenth Amendment to the United States Constitution and enjoined appellants from giving any force or effect to said laws. The District Court stayed its judgment for ten days to enable the parties to submit an application for stay to the Circuit Justice, the Supreme Court, or a Justice thereof (J.S. 3a).

On the 2nd day of April 1974, appellant filed a Motion to Modify Judgment and/or for Partial Stay in the District Court requesting a modification of the judgment to provide that the Texas dual-box election procedure in bond elections be continued pending the final outcome of this cause before the Supreme Court. The District Court entered an order on April 9, 1974, denying the appellant's Motion. The District Court granted an additional five day stay of their judgment to enable the parties to submit an application for stay to the Circuit Justice, the Supreme Court, or a Justice thereof.

Appellant filed an application for a partial stay of the District Court's judgment with the Circuit Justice, Mr. Justice Powell, on April 15, 1974. The Circuit Justice requested a reply to appellant's application from appellees. Upon receipt of the reply, this Court granted a partial stay of the District Court's judgment by order entered on April 25, 1974.

SUMMARY OF ARGUMENT

The Texas constitutional and statutory elec-

tion laws limiting the franchise in general obligation tax bond elections to persons who own taxable property which has been duly rendered for taxation fully comply with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The very nature of a general obligation bond and the universality of property subject to taxation in Texas, combine to lend constitutional validity to the property rendering requirements which, although involuntarily disenfranchising no one, limits the vote to those who are "primarily interested" in the outcome of an election, the object of which is to authorize an issue of bonds payable solely from property taxes. The Equal Protection Clause and recent decisions of this Court indicate that the challenged Texas election laws serve a valid state interest in a constitutionally permissible manner.

ARGUMENT

The issue involved in this appeal is of great importance to the State of Texas and the political subdivisions thereof, as well as more than one-fourth of all the states which in one manner or another qualify the right to vote in general obligation bond elections on the basis of property ownership or taxation. The importance of the issue is accentuated by its potential effect on the financing which is vital to the function of the states and their subdivisions in erecting and maintaining needed public improvements. In making a final determination of the issue involved in this appeal, this Court will unquestionably and substantially affect the functions of local government as well as the continued viability of reasonable state voting qualifications in this area.

A. PREVIOUS SUPREME COURT DECISIONS ON VOTING RESTRICTIONS AND THE FOURTEENTH AMENDMENT

The United States Supreme Court has been presented over the last decade with numerous controversies concerning the qualifications which various states have placed upon the exercise of the franchise in state and local elections. Although each of the decisions of this Court has been concerned with the particular type of election at hand and its circumstances, those same decisions have been applied generally in virtually every area of election law by this Court as well as the various lower courts, state and federal.

As a general proposition, the states have ". . .broad powers to determine the conditions under which the right of suffrage may be exercised." Lassiter v. Northampton Election Board, 360 U.S. 45, 50 (1959). This Court in Lassiter upheld North Carolina's literacy requirement and determined that voter qualification requirements may be sustained either when they promote intelligent or responsible voting (voting competence), or when they perform either of these functions. This Court also cited as constitutionally permissible qualifications based on age, residence, and previous criminal record.

In keeping with the principle of Lassiter, this Court has condemned voter qualifications which bear no demonstrable relation to the promotion of intelligence and responsibility in voting. Carrington v. Rash, 380 U.S. 89 (1965) (military

personnel); and Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (poll tax).

An equally important basic premise stressed by this Court is that the issues in any election should be decided by a majority of the people concerned with the outcome. Reynolds v. Sims, 377 U.S. 533 (1964); Gray v. Sanders, 372 U.S. 368 (1963); and Baker v. Carr, 360 U.S. 186 (1962). However, ". . .once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." Harper, supra.

In 1969 and 1970, this Court rendered several decisions holding invalid state laws which selectively granted the right to vote on grounds that they denied equal protection under the Fourteenth Amendment. The first of these decisions was Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969). In Kramer, this Court struck down a New York statute which granted the right to vote in a local school board election only to those who owned or leased taxable real property in the district or were parents or custodians of children enrolled in the public schools. On the same day this Court decided Kramer, it also handed down Cipriano v. City of Houma, 395 U.S. 701 (1969). The Cipriano decision invalidated a Louisiana statute which permitted only property owners to vote on the question of approving bonds that were to be financed exclusively from the revenues of a municipal public utility. The third important decision was City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970), in which an Arizona constitutional limitation of the

franchise in general obligation bond elections to persons who are qualified electors and also real property taxpayers, was held to be in violation of the Equal Protection Clause.

The decisions of this Court in Cipriano and Kramer were carefully reviewed by appellant, Texas Attorney General, with respect to their application to the Texas election laws governing general obligation tax bond elections. No changes in Texas voter qualifications were deemed necessary in light of those decisions because this Court's opinions were not inclusive of the facts or the law surrounding Texas tax bond elections. However, in order to protect the outstanding public securities of this State and to insure that any subsequently voted securities would not be subject to attack based upon a controlling, unfavorable decision of the Phoenix case, which was at that time pending in this Court, it was decided that tax bond propositions should be covered by a dual-box election. (App. 65-67)

The result of this dual-box election policy was to require that issuers of tax bonds be required to meet all the voter qualification tests of the Texas Constitution and statutes, and in addition thereto, be required to submit tax bond propositions to the balance of the otherwise qualified electorate. Before approval would be given in the form of the Attorney General's opinion as to the validity of securities, any and all underlying propositions must have been approved not only by the owners of taxable property duly rendered, voting in a separate box, but also by the aggregate of all electors.

This policy was viewed originally as a temporary measure, on the assumption that the final determination of the Phoenix case would put the question to rest. However, that decision did not settle the issue in Texas tax bond elections.

The precedents of Kramer, Cipriano and Phoenix constitute the framework for the District Court's judgment that the Texas constitutional and statutory qualifications for the exercise of the franchise in a general obligation tax bond election are in violation of the Fourteenth Amendment. The basic test announced in those cases and ostensibly applied by the District Court in this case requires that the Court determine whether the voter exclusions are ". . .necessary to promote a compelling state interest." Kramer, at 627.

There are significant differences between the three cases cited above and the provisions of the Texas election laws relevant to this case. In Cipriano, this Court held that ownership of property, as a restriction, is irrelevant to an election for the approval of bonds that would be financed by revenues of a public utility, thereby substantially and directly affecting property owners and non-property owners alike. The present case does not concern revenue bonds (App. 78-79). Both Kramer and Phoenix basically involved voting restrictions based on real property taxation under circumstances which indicated that such a classification excluded many persons significantly affected by way of both burden and benefit. Pointedly, this Court in Phoenix limited its review to this question: "Does the Federal Constitution permit a State to restrict

to real property taxpayers the vote in elections to approve the issuance of general obligation bonds?" The Texas law does not restrict voting rights to owners of real property. Indeed, under Art. 7145 (1960), V.T.C.S. "All property, real, personal or mixed, except such as may be hereinafter expressly exempted, is subject to taxation and the same shall be rendered and listed as herein prescribed." (App. 25)

Stewart v. Parish School Board of Parish of St. Charles, 310 F.Supp. 1172 (E.D.La. 1970), aff'd mem., 400 U.S. 884 (1970), is another case in the progression which merits discussion. The United States District Court for the Eastern District of Louisiana struck down Louisiana statutes which restricted eligibility to vote in tax bond elections to property taxpayers and also weighted each elector's vote by the monetary value of his assessed property. This District Court said that the affluence of the voter was not such a compelling state interest as to justify the denial of the vote to some and the dilution of the votes of the majority. Texas has no such problem. It is immaterial to the right to vote in a bond election whether one's ownership of property be great or small. DuBose v. Ainsworth, 139 S.W.2d 307 (Tex.Civ.App. 1940, writ dis.). Also, in Stewart, the District Court noted in footnote three (page 1173) that under Louisiana law the term "property taxpayer" equates with the term "real property taxpayer" or "landowner". Texas makes no such distinction and, to the contrary, generates a substantial amount of tax revenues from personal property as evidenced in the Pre-Trial Order (App. 67, 80-82).

In Montgomery Independent School District v. Martin, 464 S.W.2d 638 (Tex. 1971), the Texas Supreme Court faced the precise issue of this case. After consideration of the Kramer, Cipriano, Phoenix and Stewart cases, the Court determined that,

> "Unlike those restrictive voting laws which have been declared unconstitutionally narrow and limited, the laws in Texas have consistently granted the right to vote in general obligation bond elections to all who own personal property as well as to those who own real property. Texas Public Utilities Corporation v. Holland, 123 S.W.2d 1028 (Tex.Civ.App. 1939, writ dis.). In Handy v. Holman, 281 S.W. 2d 356 (Tex.Civ.App. 1955, no writ), the right to vote of forty resident citizens was challanged because immediately before participating in a bond election, they had each rendered personal property valued at $100 for the very purpose of voting in a bond election. The court upheld their right to vote and also said that electors should not be 'parsed' out of their constitutional right to vote by reason of any shortcoming in compliance with statutory requirements concerning the proper and timely rendition of personal property.

It is the contention of the Attorney

General, and we agree, that voter qualifications of ownership under the Texas constitutional and statutory provisions stated above, as interpreted by our decisions, are so universal as to constitute no impediment to any elector who really desires to vote in a bond election. A voter is qualified if he renders any kind of property of any value, and he need not have actually paid the tax.

The quoted provisions of the Constitution and the Education Code requiring the property owner to duly render his property for taxation have been often construed by the Texas courts in connection with voting rights. Property is 'duly rendered' within the meaning of the Texas Constitution if the property is placed on the tax rolls by the tax assessor instead of by the property owner. Texas Public Utilities Corporation v. Holland, supra, or by some other person such as a husband, partner, agent or co-tenant and even though the owner's name may not appear on the tax rolls; Markowsky v. Newman, 134 Tex. 440, 136 S.W.2d 808 (1940); Royalty v. Nicholson, 411 S.W.2d 565 (Tex.Civ.App. 1967, writ ref. n.r.e.); Lucchese v. Mauermann, 195 S.W. 2d 422 (Tex.Civ.App. 1946, writ ref. n.r.e.), cert. denied, 329 U.S. 812, 91

L.Ed. 693, 67 S.Ct. 633 (1947); Richter v. Martin, 342 S.W.2d 342 (Tex.Civ. App. 1961, no writ); Campbell v. Wright, 95 S.W.2d 149 (Tex.Civ.App. 1936, no writ); or when one makes his rendition out of time and for the very purpose of qualifying as a voter. Markowsky v. Newman, supra; Handy v. Holman, 281 S.W.2d 356 (Tex.Civ. App. 1955, no writ).

It thus appears that those who own anything can vote in a bond election if they render their property; and they are deemed by the decisions of Texas to have rendered their property if they get their property on the rolls in any manner in advance of the election. In our opinion, the requirement that the voter in a general obligation bond election must get his property on the rolls is in the interest of sound government and affords equal treatment of all citizens. One who is willing to vote for and impose a tax on the property of another should be willing to assume his distributive share of the burden. This is the manner in which the Texas Constitution, as approved by the entire citizenry of the state, provides inducement for those who wish to participate in the decision making process in a School District to assume their rightful portion of the burden they help to create."

* * *

> "To disclose one's share of the total burden for which he is responsible in a bond election requires no more than the law universally expects. To allow some property owners to vote in that kind of an election, and at the same time to permit them to avoid their fair share of the resulting obligation, would confer preferential rights. This would be a denial of equal protection to another segment of citizens."

This Court, in Kramer and Cipriano, left open the question of whether a state might under some set of circumstances qualify the franchise by limiting access to the ballot to those "primarily interested." This Court in Kramer explained that:

> ". . .whether classifications allegedly limiting the franchise to those resident citizens 'primarily interested' deny those excluded equal protection of the laws depends, inter alia, on whether all those excluded are in fact substantially less interested or affected than those the statute includes." at 395 U.S. 632

It is significant to note that the test was stated in terms of "primarily interested" rather than sole or exclusive interest.

B. TEXAS PROPERTY RENDERING REQUIREMENTS DO NOT CREATE A CLASSIFICATION.

Appellant further contends that the Texas election laws do not create a classification at all. Since Texas law subjects all property to taxation, the only additional qualification required for eligibility to vote in a general obligation bond election is that of rendering property for taxation. Electors, such as appellees, who have either ignored or who refuse to comply with their legal duty to render their property simply disenfranchise themselves. Also, as was the situation in the absentee ballot case of McDonald v. Board of Election Commissioners of Chicago, 394 U.S. 802, 807 (1969), there is no evidence that the applicable Texas election laws absolutely prohibit anyone from exercising the franchise. Kramer, supra at 627. More recently in Rosario v. Rockefeller, 410 U.S. 752 (1973), this Court, in reviewing cases cited for the proposition that the New York political party enrollment deadline disenfranchised otherwise qualified voters unconstitutionally, stated at 410 U.S. 757 and 758:

> "In each of those cases, the State totally denied the electoral franchise to a particular class of residents, and there was no way in which the members of that class could have made themselves eligible to vote. . .
>
> * * *
>
> Hence, if their (petitioners) plight can be characterized as disenfranchisement at all, it was not caused by Section 186, but by their own failure to take timely steps to effect their enrollment."

The District Court contended that extending the rationale of Rosario to the Texas rendering laws would be inappropriate because such an extension could also support an impermissible poll tax. (J.S. 9a) Harper v. Virginia State Board of Electors, 383 U.S. 663 (1966). Also the District Court concluded that Rosario was inapplicable here because New York's enrollment requirement ". . .was a reasonable state effort to preserve the integrity of the electoral process, a goal the Court called 'legitimate and valid.' The Texas rendering requirement, by contrast, is primarily an attempt to aid the states' taxation efforts, and is not designed to protect or improve the electoral process." (J.S. 26a)

The District Court, although certainly recognizing the tax collection aspects of the Texas rendering system, failed to recognize the valid state interest in protecting the integrity and quality of the electoral process through the rendering requirement. Since only property renderers will ever be called upon to repay the bonded indebtedness (App. 79), and the definition of property in Texas is so universal in scope (App. 25), the state has a sufficient interest in seeking to exclude those not "primarily interested" in the election subject. Indeed, it is essentially the responsibility of the state to establish reasonable ". . .standards designed to promote the intelligent use of the ballot." Lassiter, supra at 51. In light of this duty, it is entirely rational for the Texas election laws to exclude non-renderers in tax bond elections since they have no cognizable incentive to vote either cautiously or intelligently. Indeed, non-renderers have no reason to vote against any such tax proposal

at all. Such a non-renderer would stand to reap benefit without corresponding burden. By excluding those otherwise qualified voters who refuse to render their own property according to the laws of this State while attempting to impose a tax on the property of others, the Texas election laws create a minimal qualification requirement which serves to protect and enhance the electoral process. However, the Texas laws do not exclude anyone because of the way they might vote. That principle is true whether applied to the non-renderer, who arguably would be more inclined to approve any tax bond issue because he would not be asked to pay the indebtedness incurred, or to the property renderer, who would be inclined to make a more critical analysis of the need for the tax bond issue in view of his ultimately increased tax burden. Non-renderers are excluded because their participation in a tax bond election does not correspond and, in fact, is minimal in comparison to the interest of property renderers who, being primarily affected, necessarily bear the entire burden of the resulting tax indebtedness.

Furthermore, equating the Texas rendering laws with an impermissible poll tax fails to recognize the basic distinction between the two, to-wit: a poll tax is a fee paid for the privilege of casting a vote, whereas the Texas election laws require the rendering of property precedent to voting on the privilege of paying taxes, the very subject of the election. Also, a poll tax applies to every election held, no matter what the subject of the election might be.

C. "REASONABLENESS" IS THE PROPER CONSTITUTIONAL STANDARD TO BE APPLIED.

In Reynolds v. Sims, 377 U.S. 533 (1964), this Court summarized the historical application of the Fourteenth Amendment stating that ". . .the concept of equal protection has been tranditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged." This Court has recognized that the traditional application of the Equal Protection Clause was restricted to a view of the "reasonableness" of the state classification made the subject of complaint. McGowan v. Maryland, 366 U.S. 420, 426 (1961). Indeed, it was not until Kramer that state voter qualifications came under the full impact of the strict judicial scrutiny of the compelling-state-interest test. Dunn v. Blumstein, 405 U.S. 330, 363 (1972) (Blackmun, J., concurring).

Mr. Chief Justice Burger dissenting in Dunn pointedly described the impracticality of the compelling-state-interest test stating that

> "The holding of the Court in Pope v. Williams, 193 U.S. 621, 24 S.Ct. 573, 48 L.Ed. 817 (1904), is as valid today as it was at the turn of the century. It is no more a denial of equal protection for a State to require newcomers to be exposed to state and local problems for a reasonable period such as one year before voting, than it is to require children to wait 18 years before voting. Cf. Oregon v. Mitchell, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970). In both cases some informed and responsible persons are denied the vote, while others less informed and less responsible are permitted to vote. Some lines must be drawn. To challenge such lines by the 'compelling state interest' standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection."

Mr. Chief Justice Burger's dissent in Dunn foreshadowed the rendition of four decisions by this Court in 1973 which further illustrate the inadequacy of the compelling-state-interest test as an equal protection standard, as well as confining it to restricted circumstances, if not actually forewarning of its eventual demise.

In Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973), Mr. Justice Rehnquist expressing the view of six members of this Court held that the provisions of the California Water Code which permitted only landowners to vote in water storage district general elections and by apportioning votes in the election according to the assessed valuation of the land to be constitutionally permissible. This Court went to great lengths to explain that by reason of the

water storage district's limited purpose and its disproportionate effect on landowners as a group, the California laws did not deny equal protection by limiting the franchise to district landowners, thereby denying the vote to non-landowner residents, even though they may be farm lessees, or by weighting votes according to the assessed valuation of the land. Although obviously dealing with state qualifications on the franchise which "absolutely prohibited" interested persons, otherwise qualified to vote, from exercising the franchise, Kramer, supra at 627; McDonald, supra at 807-808, this Court in Salyer refused to apply the compelling-state-interest test. Rather, this Court returned to the more practical McGowan test stating that

> ". . .the question for our determination is not whether or not we would have lumped them together had we been enacting the statute in question, but instead whether 'if any state of facts reasonably may be conceived to justify' California's decision to deny the franchise to lessees while granting it to landowners. McGowan v. Maryland, 366 U.S. 420, 426, 6 L. Ed.2d 393, 81 S.Ct. 1101 (1961).

Mr. Justice Douglas, speaking for the dissent stated that

> "Provisions authorizing a selective franchise are disfavored, because they 'always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives.' Kramer v. Union School District, 395 U.S. 621, 627, 23 L.Ed.2d 583, 89 S. Ct. 1886. In order to overcome this strong presumption, it had to be shown up to now (1) that there is a compelling state interest for the exclusion, and (2) that the exclusions are necessary to promote the State's articulated goal. Phoenix v. Kolodziejski, supra; Cipriano v. City of Houma, 395 U.S. 701, 23 L.Ed.2d 647, 89 S.Ct. 1897; Kramer v. Union School District, supra. See also Police Jury of Vermillion Parish v. Hebert, 404 U.S. 807, 30 L.Ed.2d 39, 92 S.Ct. 52; Stewart v. Parish School Board of St. Charles, 310 F.Supp. 1172, aff'd., 400 U.S. 884, 27 L.Ed.2d 129, 91 S.Ct. 136."

The dissent went on to point out that the characterization of the water storage district as a "special-purpose unit of government assigned the performance of functions affectiving definable groups of constitutents more than other constituents," citing Avery v. Midland County, 390 U.S. 474, 485 (1968), was unrealistic in view of Hadley v. Junior College District, 397 U.S. 50 (1970). This Court in Hadley applied the compelling state interest test because the special purpose junior college district exercised generalized powers which ". . .while not fully as broad as those of the Midland County Commissioners, certainly show that

the trustees perform important governmental functions. . .and have sufficient impact throughout the district to justify the conclusion that the principle which we applied in Avery should also be applied here." (Emphasis added by the Court).

On the same day that Salyer was handed down, this Court rendered a per curiam decision in Associated Enterprises, Inc. v. Toltec Watershed Improvement District, 410 U.S. 743 (1973). In Associated Enterprises, this Court determined that a Wyoming law providing that a watershed district could be established only by referendum in which only landowners could vote and their votes were weighted according to acreage owned was constitutionally valid. Again, this Court based its decision on the premise that the watershed district was a special-purpose unit of government with limited purposes. Quite significantly however, this Court went on to note that no denial of equal protection was involved because the challenged statute ". . . was enacted by a legislature in which all of the State's electors have the unquestioned right to be fairly represented. . ." and because the popularly-elected board of supervisors of the affected conservation district must approve the creation of a watershed district. Id., at 744 and 745.

The popular representation of all qualified voters in Texas at the state level, like those in Wyoming, is unquestioned through compliance with Reynolds. Likewise, there is no question that Appellees are adequately and fairly represented by the popularly-elected City Council of Fort Worth under the holding of Avery. Therefore, the only

distinction between the non-landowner residents' relationship to the elections in Salyer and Associated Enterprises compared with the relationship of the non-rendering Appellees to the tax bond elections is the difference between a "special-purpose district " and a special purpose bond election. Certainly this is a distinction without a difference.

In Kramer Mr. Justice Stewart, in his dissent, maintained, in effect, that the franchise is not necessarily fundamental in special purpose elections because through application of Reynolds, a person's interests are well protected through the right to vote in all general, representative elections on a federal as well as state and local level. Specifically, Mr. Justice Stewart stated, at 395 U.S. 640, that

> "(W)e are dealing here, not with a general election, but with a limited, special-purpose election. The appellant is eligible to vote in all state, local, and federal elections in which general governmental policy is determined. . .He clearly is not locked into any self-perpetuating status of exclusion from the electoral process."

Mr. Justice Stewart's reasoning was interpreted, in 59 Cornell L.Rev. 687, 705 (1974), to indicate that

> "(W)hat underlies these opinions is a philosophy articulated by Justice Stewart that when voters are protected

> by the one man - one vote principle in general elections on the state and federal levels, it is both unnecessary and undesirable to rigidly apply the Reynolds rule to situations where different groups have substantially different interests in the matters of a particular unit of local government."

In a third decision rendered the same day as Salyer and Associated Enterprises, this Court determined in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) that the Texas dual approach to public school financing was constitutional. Mr. Justice Powell speaking for the majority upheld the Texas school financing system against an equal protection challenge. The Texas school financing system, to a significant degree, apportioned school district revenues on the basis of the value of taxable property in the district. The varying wealth of each district resulted in disproportionate school revenues being allocated to the different districts. Although no compelling reason for the Texas system was apparent, the constitutionality of the system was upheld because the majority concluded that it was rational. The compelling-state-interest test was not applied because the "fundamental" interest necessary to invoke strict judicial scrutiny was found lacking.

Significantly, this Court in Rodriguez decided to restrain the expansion of the "fundamental" rights analysis in equal protection cases. In the past, this Court had extended the "fundamental" rights approach to voter qualification cases even

though such rights were not explicitly found in the United States Constitution. Rodriguez, (Marshall, J., dissenting). Furthermore, the Constitution of the United States has never specifically guaranteed the right to vote in state elections. Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875); Harper, 383 U.S. at 665; Rodriguez, 411 U.S. at 35.

Furthermore, in analyzing the Salyer decision, it was stated in 59 Cornell L.Rev. 687, 702 (1974), that

> "It has been observed that underlying the early reapportionment decisions was a basic recognition of the right to vote as fundamental, and that this recognition was a generating factor in the development of the one man - one vote principle. In Salyer, by expressly finding the Reynolds rule to be inapplicable to this special purpose district, the Court has implicitly acknowledged that within this context, the right to vote is not fundamental. Once divested of this status, albeit implicitly, Justice Rehnquist's application of the rational relationship test logically follows."

This Court's decisions in Salyer, Associated Enterprises, Rodriguez and Rosario v. Rockefeller, have been interpreted as follows:

> "In the context of voter qualifications, neither history, reason nor the

> Court's opinions in Salyer and Associated Enterprises suggest any basis for a distinction based upon the generality of governmental services offered. Voter qualification problems do not involve the same political sensitivities as apportionment problems, and there is no history of refusal to decide voter qualification cases on the grounds of non-justiciability. Accordingly, a logical inference from the limitation on the compelling state interest test as an equal protection standard in voter qualification cases to elections for officials of local units of government exercising general governmental powers is a dissatisfaction with the basic rule being limited, and a determination, at the very least, not to permit its further expansion. The recent decision in Rosario v. Rockefeller holding the compelling interest standard inapplicable to procedural limitations on voting qualifications further bears this out." (Emphasis added.)

Lee, Mr. Herbert Spencer and the Bachelor Stockbroker: Kramer v. Union Free School District No. 15, 15 Ariz. L.Rev. 457-477 (1973). See also, The Supreme Court, 1972 Term, 87 Harv.L.Rev. 94-105 (1973).

The decisions of this Court in Salyer and Associated Enterprises were also analyzed by the

Court of Appeals of New York in Franklin v. Krause, 32 N.Y.2d 234, 298 N.E.2d 68, 71 (1973). The Court there determined that the plan of apportionment and voting for the Nassau County board of supervisors and the system of weighted voting involved were not in violation of the Equal Protection Clause. The Court, 298 N.E.2d at 71, stated in a footnote that:

> "In two very recent cases it was held that special-purpose units of government such as water and sewage districts could operate outside strict one man, one vote principles because they affected 'definable groups of constituents more than other constituents', and that certain groups could thus have disproportionate voting power (Salyer Land Co. v. Tulare Lake Basin Water Stor. Dist., 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659 (1973); Associated Enterprises v. Toltec Watershed Improvement Dist., 410 U.S. 743, 93 S.Ct. 1237, 35 L.Ed.2d 675 (1973). These decisions do not specifically extend to units of general local government apportionment such as we find in the instant case. There may be, however, further indication in these cases that the Supreme Court does not demand strict one man, one vote principles at the local level."

Significantly, that Court interpreted the Salyer and Associated Enterprises decisions as indicating this

Court's intention to return the question of general local government apportionment plans, from a constitutional standpoint, to the "reasonableness" standard.

In a lengthy analysis of the Salyer decision, in 72 Michigan L.Rev. 868 (1974), it was stated at pages 878 and 879 that

> "Again, like the popular-election test (Hadley), the Kramer test's prime virtues are simplicity of application and assured protection for the disenfranchised citizen. Its disadvantages are twofold. First, it is a rigid test that is difficult to satisfy. Even if the precision requirement is met, a restriction of the franchise to a specially interested group will apparently be upheld only if it is necessary to promote a compelling state interest. Moreover, under Avery, the critical decision is made by focusing on the unit's powers and its impacts on citizens generally, while the Kramer method, at the strict scrutiny stage, analyzes and compares the interests of specific individuals. The standard of precision required by the latter analysis is very high; the former method, in contrast, can be satisfied by looking at general conditions, rather than at the situations of particular individuals.

Second, the Kramer method is over-inclusive, as was the Hadley popular-election test. The application of strict scrutiny to all selective enfranchisements without a preliminary inquiry similar to the powers-and-impacts analysis of Avery neglects the possibliity that, in some restriction cases, it may not be appropriate to give the disenfranchised citizen political influence in the unit or decision in question because he is not affected by that unit or decision to the same degree as are others. For the Court in Kramer, however, the presumed possibility that the disenfranchised citizen needs representation was sufficient to trigger the application of strict scrutiny. The Court may have felt that it was not necessary to make an initial inquiry into impacts in restriction cases, as it was in malapportionment cases such as Avery, because the total denial of the vote seems a more grievous violation of the right to effective representation than does dilution of malapportionment. However, a restriction on the franchise in an election involving a local government unit the activities of which have varying degrees of impact may be a less serious violation of the interest in representative government than severe malapportionment of districts in a general governing unit. In

> short, in restriction cases, also, there exists a need for a method that can accommodate this possibility.

At pages 882-884, the analysis continues stating that

> "Like Avery, Salyer does not propose a blanket test. Rather, it attempts to define those cases in which a structure in accord with one person - one vote and the unrestricted franchise is not the most appropriate solution to the representational problem. Again like the test applied in Avery to a malapportionment case, this method focuses on the nature of the individual-institutional link by inquiring whether all citizens are affected in ways that are sufficiently uniform that each citizen should have equal representation. In extending this approach to Salyer, which also involved a restriction, the Court relaxed the prior rigid approach it had taken in restriction cases."
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> * * *
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> "The question asked by the Court was whether the duties of the unit or official in question are 'far removed from normal governmental activities.' The Tulare Lake Basin Water Storage District met this test because it does not provide 'general public

> services such as schools, housing, transportation, utilities, roads or anything else ordinarily financed by a municipal body.' To fulfill this element, then, the primary requirement seems to be that the unit in question be functionally specialized or unusual, but whether a unit provides an unusual or specialized service should not be determinative in an evaluation of the constitutionality of the related voting scheme. The critical question is, rather, whether the impact on the citizens is so uniform that each citizen should participate equally in political decision-making." (Emphasis added.)

Judge Thornberry, in his Memorandum Opinion in this case, argues that the interest of the State of Texas in limiting the electorate to those who will be primarily affected by its outcome, ie., those upon whom the financial burden created by the bonds will fall, is insufficient to withstand judicial scrutiny (J.S. 12a). Although Judge Thornberry admits that the principal and interest on the bonds will be paid solely from taxes on real, personal and mixed property rendered by the City's taxpayers, he concludes that the Texas laws exclude non-renderers who arguably will contribute to the repayment of the bonds indirectly through rents and purchased goods (J.S. 13a - 14a).

Judge Thornberry's analysis fails to consider two important factors: first, the tax bond election will unquestionably have a direct and

"disproportionate effect" on renderers, Salyer, supra at 728; Associated Enterprises, supra at 744; second, the Texas general obligation tax bond election laws do not absolutely prohibit anyone from rendering any item of property, and, therefore, qualify to vote. Montgomery Independent School District; Kramer; and McDonald. Furthermore, all those non-renderers who "indirectly" contribute to the payment of property taxes as lessees or purchasers of goods are in positions analogous to the lessees in Salyer. The Court in Salyer noted that the lessees had interests in the activities of the water storage district quite similar to that of landowners. However, this Court determined that those lessees could bargain with their lessors for the franchise by proxy. Also, it was reasoned that ". . .just as the lessee may by contract be required to reimburse the lessor for the district assessments so he may by contract acquire the right to vote for district directors." Salyer, at 733. Therefore, the lessees were not absolutely disenfranchised nor were they denied equal protection, although excluded from the franchise by state law, even though their lease contracts required the lessee to carry the proportionate share of the districts financial burden ostensibly assessed against and to be paid by his lessor. Obviously, non-renderers are not denied equal protection of the laws by virtue of the Texas rendering qualification since they have either ignored or refused to render some item of property, as required by law, even though they may be indirectly contributing to the payment of taxes which will be used to retire the bond indebtedness made the subject of the election.

In interpreting the treatment of alleged

interests of lessees in the Salyer case, it was noted in 27 Oklahoma L.Rev. 273, 278 (1974), that

> "An argument similar to the one in Phoenix was made in Salyer concerning lessees of real property. It was argued that lessees have interests indistinguishable from landowners and should be given the franchise since the cost of district projects would be passed along to the lessees in the form of higher rent. The Court reasoned that allowing lessees to vote would allow manipulation of the district by large landowners who could gain a majority on the board of directors through the use of numerous short term leases. This reasoning is questionable since there was evidence that the district was presently being manipulated by the one large landowner. The Court also reasoned that if a lessee 'feels that the right to vote in the election of directors of the district is of sufficient import to him, he may bargain for that right at the time he negotiates his lease.' This reasoning is also questionable when one considers the bargaining position of the lessee with a large landowner at the time he negotiates his lease. The Court appeared to be intent on rejecting the lessee argument of Phoenix."

Dissenting in Kramer, Mr. Justice Stewart noted generally, at 395 U.S. 637, that

> "Clearly a State may reasonably assume that its residents have a greater stake in the outcome of elections held within its boundaries than do other persons. Likewise, it is entirely rational for a state legislature to suppose that residents, being generally better informed regarding state affairs than are non-residents, will be more likely than nonresidents to vote responsibly. And the same may be said of legislative assumptions regarding the electoral competence of adults and literate persons on the one hand, and of minors and illiterates on the other. It is clear, of course, that lines thus drawn cannot infallibly perform their intended legislative function. Just as '(i)lliterate people may be intelligent voters,' nonresidents or minors might also in some instances be interested, informed, and intelligent participants in the electoral process. Persons who commute across a state line to work may well have a great stake in the affairs of the State in which they are employed; some college students under 21 may be both better informed and more passionately interested in political affairs than many adults. But such discrepancies are the inev-

> itable concomitant of the line drawing that is essential to law making. So long as the classification is rationally related to a permissible legislative end, therefore - as are residence, literacy, and age requirements imposed with respect to voting - there is no denial of equal protection."

Later, in the context of Phoenix, Mr. Justice Stewart added, at 399 U.S. 217 and 218, that

> "Under Arizona law a city's general bonded indebtedness effectively operates as a lien on all taxable real estate located within the city's borders. During the entire life of the bonds the privately owned real property in the city is burdened by the city's pledge - and statutory obligation - to use its real estate taxing power for the purpose of repaying both interest and principal under the bond obligation. Whether under these circumstances Arizona could constitutionally confer upon its municipal governing bodies exclusive and absolute power to incur general bonded indebtedness without limit at the expense of real property owners is a question that is not before us. For the State has chosen a different policy, reflected in both its constitutional and statutory law. It has told the governing bodies of its cities that

while they are free to plan and propose capital improvements, general obligation bonds cannot be validly issued to finance them without the approval of a majority of those upon whom the weight of repaying those bonds will legally fall.

This is not the invidious discrimination that the Equal Protection Clause condemns, but an entirely rational public policy."

Commenting upon the "primarily interested" analysis developed in Phoenix, the Supreme Court of Utah in Cypert v. Washington County School District, 473 P.2d 887, 892 (1970), stated that

"In order to justify their declarations above quoted it would be necessary for the majority of that court to make a satisfactory answer to this question: If it be true that the non-taxpayers contribute 'as directly as property owners' to the servicing of the bonds, why is it so necessary that the bonds be general obligation bonds? The answer is obvious and inescapable: It is in order to make them salable; and they are salable because there stands behind them the power and the agreement for the levying of taxes upon the property within the district to guarantee their payment. Anyone who will take an honest

and realistic look at such a financing plan, and consider a comparison between a bond issue without such a 'general obligation' feature and one with it, will see very clearly that it is this power to tax the property in the district as the ultimate guarantee behind the bonds that makes such a project feasible. Whereas, if the bond issue were only to be paid through the indirect sources, as from those who pay no property tax, the bond purchasers would only be general creditors, without security. The result would be that the bonds would not be salable, nor the financing project feasible. It requires no further elaboration to show beyond peradventure of doubt that the taxpayers and their property have a very substantial commitment beyond those who are not such property taxpayers, and to demonstrate the complete unsoundness of the statement that the latter, 'contribute as directly as property owners.'"

In further interpreting the Salyer case, it is noted, at 27 Oklahoma L.Rev. 273, 279 (1974), that

"As was pointed out in Salyer: 'Nor, since assessments against landowners were to be the sole means by which the expenses of the district were to be paid, could it be said to be

unfair or inequitable to repose the franchise in landowners but not residents.' The Salyer case indicates that if one class solely is to pay for something, it is more substantially interested and affected than are those who are not to pay even though those who do not pay may be substantially interested and affected in some other way. In other words, the interested and affected test as applied appears to mean economically interested and affected."

In 1971, this Court rendered a decision in Gordon v. Lance, 403 U.S. 1 (1971), which upheld West Virginia laws requiring a 60% supermajority vote in referendum elections held to approve bonded indebtedness or tax increases above limits established by the Constitution of West Virginia. Mr. Chief Justice Burger, speaking for the majority, stated at 403 U.S. 7 and 8, that

"Whether these matters of finance and taxation are to be considered as less 'important' than matters of treaties, foreign policy or impeachment of public officers is more properly left to the determination by the States and the people than to the courts operating under the broad mandate of the Fourteenth Amendment. It must be remembered that in voting to issue bonds voters are committing, in part, the credit of infants and of generations

yet unborn, and some restriction on such commitment is not an unreasonable demand. That the bond issue may have the desirable objective of providing better education for future generations goes to the wisdom of an indebtedness limitation: it does not alter the basic fact that the balancing of interests is one for the State to resolve.

Wisely or not, the people of the State of West Virginia have long since reserved to remove from a simple majority vote the choice on certain decisions as to what indebtedness may be incurred and what taxes their children will bear."

This Court's decision in Gordon was interpreted in a footnote, in 47 Washington L. Rev. 391 (1972), to indicate that

"It can be said that the only reason for supermajority requirements in local bond elections is the protection of property taxpayers from high tax indebtedness placed on them by non-property owners. The protection of property owners would seem to be unconstitutional under Cipriano v. City of Houma, 395 U.S. 701 (1969), although a distinction might be made because Cipriano involved the outright denial of the franchise to non-property

> owners. The Court's avoidance of attributing an impermissible purpose to a legislature in order to uphold a statute is in accord with general Court precedent."

Although this Court was not properly presented with the issue of the property ownership qualifications required in Idaho bond elections because that issue was not timely raised in the State courts, Edelman v. People of State of California, 344 U.S. 357 (1953); Louisville, etc. R.Co. v. Woodford, Kentucky, 234 U.S. 46 (1914), this Court dismissed the appeal in Bogert v. Kinzer, 93 Idaho 515, 465 P.2d 639 (1970), appeal dismissed, 403 U.S. 914 (1971) for want of a substantial federal question. That appeal, as presented to this Court, involved a challange to Idaho laws requiring a two-thirds supermajority vote in general obligation bond elections. Limited to those facts, this Court dismissed the appeal relying on Gordon. However, the challenged Idaho laws, as admitted in the state court decision, permit only real property taxpayers to cast votes in the general obligation bond election, therefore, requiring a two-thirds majority of real property taxpayers. The dissent in the state court recognized the true reason for the Idaho laws stating that:

> "The articulated state interest in requiring a 2/3 majority vote in bond elections is a prudent fiscal policy which requires that there be a substantial approval of a given project before a municipality embarks on a

> voyage of increased indebtedness. This state policy of fiscal restraint would have more weight if it was not already safeguarded by the constitutional requirement that voters at bond elections must be property owners. In the recent case of Muench, et al. v. Paine, et al., 93 Idaho 473, 463 P.2d 939 (January 16, 1970) this Court upheld this constitutional provision. This Court held that property owners as taxpayers, by and large have a greater and more permanent economic stake in the community than non-property owners." 465 P.2d at 650.

Since protection of property taxpayers is the essential state interest in requiring supermajorities in bond elections, it is significant to note that had Texas laws required a 60% supermajority rather than rendition of property for taxation as a means of protecting the primary interests of those who would bear the burden of retiring the bond indebtedness, then the April 11, 1972 Fort Worth general obligation bond election would still have failed, receiving the approval of only 52.2% of all votes cast.

It is submitted that, given the important state interest in protecting property taxpayers as implicitly approved in Gordon, the Texas property rendering laws not only attain that important state goal, but do it with a greater degree of precision than any supermajority requirement could possibly reach.

Also, Judge Thornberry argues that the present rendering voters will not be exactly the same renderers who will eventually repay the bonds due to "upward mobility" of the people and other factors. (J.S. 13a - 14a). Judge Thornberry's concern with the fact that the present voting renderers will not be the same ones who will eventually repay the bonds simply fails to recognize the fact that the exact same voters who cast votes in any election of any duration, will not be the exact same people who will have to abide by that decision as time passes. Judge Thornberry's argument is thoroughly answered in Gordon wherein the importance of a bond election is deemed reason enough to permit a state to require even supermajority approval because ". . . in voting to issue bonds voters are committing, in part, the credit of infants and of generations yet unborn, and some restriction on such commitment is not an unreasonable demand."

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mike Willatt, Assistant Attorney General of Texas, as of counsel for Appellant herein and member of the Bar of the Supreme Court, hereby certify that true and correct copies of the above foregoing Brief for the Appellant have been served upon the several parties thereto, in compliance with Rule 33(1) of the United States Supreme Court Rules, by placing three copies in the mail, first class postage prepaid, to S. G. Johndroe, Jr., City Attorney and Attorney for Appellees R.M. Stovall, S. G. Johndroe, Jr., Roy A. Bateman, Leonard E. Briscoe, Taylor Gandy, Jess M. Johnston, Jr., W. S. Kemble, Jr., John O'Neill, Ted C. Peters, Pat Reece, Mrs. Margaret Rimmer, and the City of Fort Worth, at 1000 Throckmorton Street, Fort Worth, Texas 76102; and that three copies were placed in the mail, first class postage prepaid, to Don Gladden and Marvin Collins, attorneys for Appellees, at 702 Burk Burnett Building, Fort Worth, Texas 76102. All parties required to be served have been served.

Witness my hand this 25th day of November, 1974.

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Supreme Court, U. S.
FILED
DEC 17 1974
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NO. 73-1723

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

JOHN L. HILL, ATTORNEY GENERAL OF TEXAS,
APPELLANT

V.

MICHAEL L. STONE, ET AL,
APPELLEES

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF FOR THE APPELLEES

DON GLADDEN
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December 13, 1974

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NO. 73-1723

IN THE

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OCTOBER TERM, 1974

JOHN L. HILL, ATTORNEY GENERAL OF TEXAS, APPELLANT

V.

MICHAEL L. STONE, ET AL, APPELLEES

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF FOR THE APPELLEES

TO THE HONORABLE UNITED STATES SUPREME COURT:

NATURE OF THE CASE

The unanimous judgment on March 25, 1974 of the three judge court below holding unconstitutional and enjoining the implementation of the herein challenged Texas provisions was stayed by this Court only to the extent of permitting the Attorney General to continue in force the dual balloting procedures effectuated by him in 1969 as a "temporary measure" pending resolution of the constitutional issues involved in Phoenix v. Kolodziejski, 399 U.S. 204 (1970). (pp. 8, II, AG Juris. State.).[1]

QUESTIONS PRESENTED

Ultimate Question

IS THE TEXAS REQUIREMENT THAT VOTERS IN GENERAL PURPOSE BOND ELECTIONS BE OWNERS

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[1]All citations to the facts stipulated by the parties in the Pre-Trial Order will be to the appropriate pages in the Printed Appendix (tan), cited hereafter as "Stip. # ____, p. _____, App.". All citations to the judgment and opinion below will be to the appropriate pages in the Jurisdictional Statement of the Texas Attorney General (white), cited hereafter as "p. _____, AG Juris. State.". All citations to arguments of Appellants will be to the appropriate pages of the Texas Attorney General's Jurisdictional Statement (white) and Brief (white), hereafter cited to respectively as "p. _____, AG Juris. State." and "p. _____, Appellant's Brief.".

AND RENDERERS OF TAXABLE PROPERTY CONSISTENT WITH THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT?

Threshold Question

WHAT IS THE APPROPRIATE EQUAL PROTECTION STANDARD FOR DETERMINING CONSTITUTIONALITY OF THE TEXAS REQUIREMENT THAT VOTERS IN GENERAL PURPOSE BOND ELECTIONS OWN AND RENDER PROPERTY?

If Compelling State Interest Test Applicable

WHETHER THE TEXAS REQUIREMENT THAT VOTERS IN GENERAL PURPOSE BOND ELECTIONS OWN AND RENDER TAXABLE PROPERTY IS NECESSARY TO PROMOTE SOME COMPELLING STATE INTEREST?

If Rational Basis Test Applicable

WHETHER THERE IS A RATIONAL BASIS FOR THE TEXAS REQUIREMENT THAT VOTERS IN GENERAL PURPOSE BOND ELECTIONS OWN AND RENDER TAXABLE PROPERTY?

CONSTITUTIONAL AND STATUTORY PROVISIONS

The state statutory and constitutional provisions involved are Art. 6, Secs. 3 and 3a of the Texas Constitution, and Arts. 5.03, 5.04 and 5.07 of the Texas Election Code.

The City of Fort Worth Charter provision involved is Section 19 of Chapter 25 of the Fort Worth City Charter. These are set forth in Appellant Attorney General's Jurisdictional Statement at pages 1c through 6c.

The United States Constitutional provision involved is the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States:

> ...nor shall any State...deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. Amend. XIV.

STATEMENT OF THE CASE

There are no disputed facts in this case.

On April 11, 1974 the City of Fort Worth held a bond election. A $6.8 Million Library Bond issue and a $3.0 Million Transportation System Bond issue were submitted to the electorate in a dual box election. (Stip. #22, 23, pp. 58-69 App.). The Transportation System bonds passed in the property owner box and the non-property owner box. (Stip. #47, pp. 86, 87, App.). Those bonds have long since been certified by the Attorney General and sold by the City of Fort Worth. (Stip. #48, p. 87, App.). The Library Bonds passed in the non-property owner box, passed in the aggregate majority of persons voting in both boxes, but failed in the property owner box. (Stip. #47, pp. 86, 87, App.).

The Attorney General, whose approval is a prerequisite to sale of any general obligation bonds in Texas, has continuously refused since 1969 to approve any bonds unless such bonds received a majority vote of the aggregate of property owners and non-property owners and a majority vote of

property owners. (Stip. #24, pp. 65-67, App.). While everyone otherwise qualified is theoretically entitled to vote, property owners are given a veto.[2]

The City considered the Library Bond issue to have failed. (Stip. #29, p. 74 App.).

The decision to sell the bonds is a legislative decision resting with the governing body of the appropriate political subdivision. In this case, the City Council of the City of Fort Worth is vested with such discretion. (Stip. #10, pp. 45-47, App.). However, in this case, there is absolutely no question how the council would exercise its discretion. They would sell the Library Bonds if they could. The following facts make that clear:

1. Unless the city had intended to sell such bonds it is absurd to believe that they would adopt an ordinance submitting the proposition to the voters and spend the money necessary to conduct a city-wide election on that proposition. (See Stip. #9, p. 45, App.; Pl. Ex. B).

2. The City Council has in fact sold the bonds approved by a majority of the rendering property owners

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[2]The dual box election procedure devised by the Attorney General to implement this policy decision is not authorized by any Texas or Federal law, statute or otherwise.

in Proposition 1 (Transportation System Bonds) which was submitted at the same time as Proposition 2 (Library Bonds). (Stip. #48, p. 87, App.).

3. The City Council has stated in a motion adopted unanimously on April 17, 1972, that their legal discretion would be exercised in favor of the sale of the bonds if legal entanglements did not exist. (Stip. #28, pp. 73, 74, App.).

4. The City Council, the city, attorney, and the mayor have stipulated that if the property rendition requirements did not exist, they would take the necessary steps to sell the Library Bonds as soon as possible. (Stip. #26, 27, 30, pp. 70-73, 75, 76, App.).[3]

The purposes for which the City of Fort Worth may issue bonds are coextensive with the powers of the city council sitting as a legislative body. Specifically, the City Charter provides that such bonds may be issued and sold "for permanent improvements and for any other legitimate municipal purpose as may be determined by the City

---

[3]There are a number of technical procedural steps the City would have to take as a prerequisite to issuance and sale of the Library Bonds. An exhaustive list of these steps appears in Stipulation #19, pp. 54-56, App. All city officials involved have stipulated that they would take all of such necessary steps. (Stip. #26, 27, 30, pp. 70-73, 75, 76, App.).

Council,..." (Stip. #10, pp. 45-48, App.). [Emphasis added]

While the challenged Texas constitutional and statutory provisions require that a voter be an owner and renderer of taxable property, the Fort Worth City Charter goes further and requires that the voter actually have paid the tax. The relevant portion of the Charter provides:

> Provided, that no bonds shall be issued, nor bonded debt created, unless authority therefor shall first be submitted to the qualified voters who pay taxes on property situated within the corporate limits of the City of Fort Worth;.... (Stip. #45, p. 46, App.). [Emphasis added]

Appellees, property owners and non-property owners who voted in that election, brought this suit challenging Texas provisions of law limiting the right to vote in general purpose bond elections to rendering property owners, and seeking to enjoin the Attorney General and the City from considering the property ownership requirements of Texas law in determining whether the bonds passed.

SUMMARY OF ARGUMENT

I. CHALLENGED CLASSIFICATIONS FAIL UNDER ANY TEST

A. Compelling State Interest Standard

This Court in Kramer v. Union Free School District, 395 U.S. 621 (1969), Cipriano v. Houma, 395 U.S. 701 (1969), and Phoenix v. Kolodziejski, 399 U.S. 204 (1970) laid down the applicable tests to be applied in this case:

> There must be a compelling state interest for the classification;
> and the classification must be necessary to promote that compelling state interest.

1. Contrary State Court Decision

The Texas Supreme Court in Montgomery Independent School District v. Martin, 646 S.W.2d 638 (Tex. Sup. 1971) upheld the constitutionality of the voting classification challenged in this case in the face of this Court's decision in Phoenix, supra. The Texas Supreme Court avoided any meaningful attempt to apply the standards set down by this Court in Phoenix.

2. (Omitted from Summary)

3. Compelling State Interest Applied To Facts Of This Case

a. & b. Encouraging rendition of

taxable property

Assuming for the sake of argument that the challenged classificatory scheme does somehow encourage citizens to disclose and render for taxation a token amount of property, rendition of a thirty cent pencil is something less than compelling. And this is all it takes to vote. Exclusion of a voter from the polls in a bond election is a clumsy and imprecise manner in which to collect taxes. There are other recognized, better methods to encourage rendition of taxable property. Thus, these challenged voting laws are not necessary to encourage citizens to render property for taxation.

c. & d. Only those who pay vote

Assuming arguendo that the classificatory scheme challenged here somehow limits the franchise to those who will pay for the obligations assumed in the election, this is not a compelling state interest. It disenfranchises multitudes of persons who are interested in such broad issues as a transportation system or libraries. The Court in Stewart v. Parish School Board of St. Charles Parish, 310 F. Supp. 1172 (1970), aff'd mem. 400 U.S. 884 (1970) held that the special interests of property taxpayers is not a compelling state interest. Moreover, there are many persons otherwise qualified to vote who have no property rendered for taxation in the year of the election,

but who will render property and pay taxes in the future years. That money will be applied to the retirement of the bonds. Others will effectively pay property taxes in the form of rent or costs of goods sold.

e. & f. Only persons primarily interested vote

Limiting the franchise to those who are primarily interested in the outcome of the election (if indeed this could be done) would not be a compelling state interest for the reason that the voter not primarily interested in the outcome could nevertheless cast an intelligent informed ballot. However, that question is effectively pretermitted by recognition that no rational argument can be made that a requirement of rendition of property for taxation in any manner limits the franchise in a library bond election to the persons primarily interested in the outcome.

4: (Omitted from Summary)

B. Rational Basis Standard

This Court in Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966), struck down the constitutionality of a poll tax in Virginia. Applying the rational basis standard, this Court held that:

> wealth like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Harper, supra, at 668.

1. Encouraging Rendition of Taxable Property

One of the avowed purposes of the Texas classificatory scheme - to encourage disclosure and rendition of taxable property - has no more relation to voter qualifications than does wealth, highway safety, or any number of other topics in which the state is otherwise legitimately concerned.

2. Only Those Who Pay Vote

Assuming arguendo that the Texas scheme somehow limits the franchise to those who will pay for the obligation assumed in the election, this does not prevent a voter from intelligently exercising his ballot.

3. Only Persons Primarily Interested Vote

If it may be said for the purposes of argument that the classificatory scheme in this case somehow limits

the franchise to those who are primarily interested in the outcome of the elections this, too, is no justification since it does not render a voter incapable of casting an intelligent ballot.

4. Degree of Discrimination Irrelevant

Both the opinion of the Texas Supreme Court and the jurisdictional statement of the Attorney General assert that the Texas classificatory scheme does not stop anyone from voting who really wishes to vote, since there is no minimum amount of property which a person may render, and he need not have paid the tax. That contention was answered emphatically in Harper, supra:

> We say the same whether the citizen otherwised qualified to vote has a dollar and fifty cents in his pocket or nothing at all. pays the fee or fails to pay it. 383 U.S. at 668.

II. APPROPRIATE TEST

The Appellant Attorney General

argues in his Brief that this Court's decisions in Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973) and Associated Enterprises, Inc. v. Tol-Tec Watershed Improvement District, 410 U.S. 743 (1793) are authority for this Court to uphold the constitutionality of the Texas classificatory scheme.

It is respectfully submitted that this Court may apply the rational basis standard instead of compelling state interest test to the case at bar only if it is willing to overrule Kramer, supra, Cipriano v. Houma, 395 U.S. 701 (1969), Phoenix, supra, and Parish School Board of the Parish of St. Charles v. Stewart, supra.

Further, it is respectfully submitted that neither Salyer nor Associated Enterprises offer a basis for upholding the constitutionality of the challenged Texas provisions. Neither of such cases involve bond elections. More fundamentally, however, both of those cases held in essence that when land is virtually the only thing affected by the outcome of an election, and the impact of the election on land alone is clear, then the franchise may be

restricted to real property owners. The challenged Texas classificatory scheme in no way limits the franchise to persons primarily affected by the outcome of the election at bar. In what manner can it be said that the restriction of the franchise to rendering property owners restricts the franchise to persons primarily interested in the outcome of a library bond election? There is simply no manner, rational or irrational in which property ownership or rendition of property for taxation is related to use of a public library.

It is interesting to note that even though the Attorney General has suggested the propriety of this Court applying the rational basis standard rather than the compelling state interest test, he advances no rational basis on which it can be said that non-rendering property owners or non-property owners should be disenfranchised by the State of Texas in bond elections involving issues of general concern to the community. Perhaps that failure on the part of the Attorney General is because there is no such rational basis.

III. PRIOR INDISTINGUISHABLE DECISION OF THIS COURT

A. Same Facts

In Phoenix v. Kolodziejski, 399 U.S. 204 (1970) this Court held unconstitutional Arizona statutes and constitutional provisions which limited the right to vote in general obligation bond elections to real property taxpayers. There is no

substantial distinction between that case and the case at bar. Both cases involve general obligation bond elections. While Phoenix, supra, involved restriction of the franchise to real property taxpayers, the case at bar involves restriction of the franchise to rendering property owners ("property" including personal property), but there is no rational distinction between Phoenix and the case at bar which can be made on that basis. Both Phoenix and the case at bar involve municipal improvements of general public interest such as parks, playgrounds, libraries, transportation systems, etc. In Phoenix, it was certain that more than half the debt service requirements on the bonds would be satisfied from revenues of the other local taxes paid by non-property owners. In the case at bar the testimony was that the general obligation bonds would be paid off solely from the proceeds of taxes of persons who own real and personal property. However, this Court in Phoenix, spoke directly to that issue stating that

> justification for restricting the franchise to the property owners seems to be the strongest in the case of municipality which, unlike Phoenix, looks only to property tax revenues for servicing general obligation bonds. But even in such a case the justification would be insufficient. [emphasis added], Phoenix, supra, 399 U.S. at page 210.

B. Similar Case Involving Both Real And Personal Property Affirmed By This Court

There is direct precedent for this court summarily affirming the decision of the court below in this case. In Parish School Board of the Parish of St. Charles v. Stewart, aff'g 310 F. Supp. 1172 (EDLa...1970), 400 U.S. 884 (1970), a three judge district court within the Fifth Circuit held that Louisiana provisions limiting the right to vote in general obligation bond elections to "property taxpayers" were unconstitutional. The term "property taxpayers" included those who paid tax on personal property. This Court affirmed in a memorandum opinion citing Phoenix, supra.

C. Disagreeing Judge Below Had To Concur

One of the district judges below who concurred in the result reached by the unanimous court below could find no way to distinguish Phoenix, supra. He stated in his opinion,

> I deeply regret that I have been unable to find a legitimate way to distinguish the cases above cited. [Phoenix]. (Concurring opinion of Judge Brewster, p. 22a AG Juris. State.).

Kramer, supra, Cipriano, supra, Phoenix, supra, and Parish School Board of the Parish of St. Charles, supra, really do not leave even one significant question which this Court needs to answer about the constitutionality of Texas classificatory scheme. In Phoenix, this Court noted:

> ***Nor have we been shown that the fourteen states now restricting the franchise have unique problems that make it necessary to limit the vote to property owners. Phoenix, supra, at page 212-213.

Texas is one of those fourteen states.

In the face of that decision the Texas Supreme Court has squarely held the voting scheme challenged herein constitutional.

It is respectfully submitted that this Court must affirm the trial court decision.

ARGUMENT AND AUTHORITIES

I. REGARDLESS OF WHICH CONSTITUTIONAL STANDARD IS APPLIED, THE VOTER REQUIREMENT OF PROPERTY OWNERSHIP AND RENDITION IN GENERAL PURPOSE BOND ELECTIONS IS VIOLATIVE OF THE EQUAL PROTECTION CLAUSE.

A. The requirement that voters in general purpose bond elections own and render taxable property is not necessary to promote any conceivable compelling state interest.

1. The Texas Supreme Court has upheld the constitutionality of the voting classification challenged in this case in the face of this Court's Decisions of Kramer v. Union Free School District and Phoenix v. Kolodziejski.

In Montgomery Independent School District v. Martin, 464 S.W.2d 638 (Tex. Sup. 1971) the Texas Supreme Court held that the Texas laws being attacked in the present case are not violative of the Equal Protection Clause of the Fourteenth Amendment. The opinion of the Court does not analyze whether the voting classification bears any relation to voter qualifications[4] nor does it analyze whether the

[4] "But we must remember that the interest of the State, when it comes to voting is limited to the power to fix the qualifications. Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process." Harper v. Virginia State Board of Elections, 383 U.S. 663 at 668 (1966).

voting classification is necessary to promote a compelling state interest[5] which are the applicable constitutional standards.[6] Two purposes of the voting classification are set forth in the opinion:

(1) to limit the franchise to those who will pay for the obligations assume in the election,[7] and

[5] "Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest." Kramer v. Union Free School District, 395 U.S. 621 at 627 (1969).

[6] The traditional "rational basis" standard was apparently applied by this Court in Harper, Supra, but was rejected in Kramer v. Union Free School District, 395 U.S. 621 at 628 (1969).

[7] "One who is willing to vote for and impose a tax on the property of another should be willing to assume his distributive share of the burden.... To allow some property owners to vote in that kind of an election, and at the same time to permit them to avoid their fair share of the resulting obligation, would confer preferential rights. This would be a denial of equal protection to another segment of citizens." Montgomery Independent School District v. Martin, 464 S.W.2d 638 at 641, 642 (Tex. Sup. 1971).

(2) to encourage disclosure and rendition of taxable property.[8]

2. The challenged provisions of Texas law are not entitled to a presumption of constitutionality.

The clear mandate of Kramer v. Union Free School District, 395 U.S. 621 (1969) is that these challenged Texas provisions are not entitled to the general presumption of constitutionality afforded state laws.[9]

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[8] "In our opinion, the requirement that the voter in a general obligation bond election must get his property on the rolls is in the interest of sound government and affords equal treatment to all citizens. ... This is the manner in which the Texas Constitution, as approved by the entire citizenry of the State, provides inducement for those who wish to participate in the decision making process in a School District to assume their rightful portion of the burden they help to create.

Personal property such as stocks, bonds, cash, automobiles, and livestock furnishes a great deal of the State's taxable property. No class of property is so susceptible to concealment and escape from taxation as personal property. ... There may be other means to reach personal property, but experience has shown that every means must be pressed into service if the obligations of government are to be spread equally." Montgomery Independent School District v. Martin, 646 S.W.2d 638 at 641 (Tex. Sup. 1971).

[9] Kramer v. Union Free School District, 395 U.S. 621 at 627, 628 (1969).

3. The only three conceivable purposes of the Texas voting classification fail to meet the constitutional standard of Kramer v. Union Free School District and Phoenix v. Kolodziejski.

This Court announced a strict standard for measuring state action in elections in Kramer v. Union Free School District:

> (I)f a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest. Kramer v. Union Free School District, 395 U.S. 621 at 627 (1969).

It should be observed that this standard has two distinct requirements:

(1) there must be a compelling state interest for the classification; and

(2) the classification must be necessary to promote that compelling state interest.

Thus, in order to decide whether or not these five Texas provisions are consistent with the Equal Protection Clause of the Fourteenth Amendment, we must answer one or both of the following questions:

(1) is there a compelling state interest for the classifications made

by these five provisions?

(2) even if there is, is the classification adopted necessary to promote that compelling state interest?

a. The interest of the state in encouraging its citizens to disclose and render for taxation some property, however little, is not a compelling state interest.

It is perfectly clear that the challenged Texas provisions do not require the voter to assume his pro rata share of the tax burden in order to vote.

> A voter is qualified if he renders any kind of property of any value, and he need not have actually paid the tax. Montgomery Independent School District v. Martin, 464 S.W. 2d 638 at 640 (Tex. Sup. 1971).[10]

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[10] There is however some language in the same opinion indicating that the challenged provisions do encourage each citizen to assume his fair share of the tax burden.

> "To disclose one's share of the total burden for which he is responsible in a bond election requires no more than the law universally expects. To allow some property owners to vote in that kind of an election, and at the same time permit them to avoid their fair share of the resulting obligation, would confer perferential rights." 464 S.W.2d 641, 642.

The interest of the State in securing disclosure and rendition for tax purposes of a thirty-cent pencil is something less than compelling. The cost of accounting for such an item probably exceeds the tax that can be collected.

b. The challenged Texas voting classification is not necessary to promote the state interest, if any, of encouraging each citizen to disclose and render for taxation some of his property.

A law which exacts a monetary penalty for failure to render property for taxation is an appropriate and recognized technique for collecting taxes. Employment of a tax-collector assessor to discover and render taxable property is another recognized way to collect taxes. Both of these means are tailored to the end sought to be accomplished. Voting laws are not designed primarily to collect taxes, but are designed to give the citizen a voice in his government. Since there are other, better ways to encourage

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This language cannot be reconciled with the language of the Court in that case quoted in the text.

Moreover the applicable provision of the Fort Worth City Charter, not considered in Montgomery, seems to limit the vote to property owners "who pay taxes." Section 19, Chapter 25, Fort Worth City Charter.

rendition of taxable property, these voting laws are certainly not necessary to promote that goal.

It is difficult to assess how many persons who otherwise would not render some property for taxation are persuaded to render taxable property by these Texas laws. The number of such persons is probably not very great. There are surely many more persons whose uncertainty over the property rendition requirements keeps them from the polls. Since these voting laws largely fail to encourage rendition of taxable property, they are not necessary to promote that goal.

c. The interest of the state in limiting the franchise to those who will pay for the obligations assumed in the election is not a compelling state interest.

The five Texas provisions attacked in this suit disenfranchise many voters who are directly affected by the results of the elections which are held pursuant to the challenged provisions. The bond election held on April 11, 1972, was for the purpose of submitting two propositions to the electorate:

Proposition 1 ..... $ 3,000,000
(Transportation System Bonds)

Proposition 2 ..... $ 6,860,000
(Library Bonds)

Certainly there is no compelling reason

to adopt a classification which keeps otherwise qualified voters from voting on matters such as these. Each of these improvements vitally affects all the residents of Fort Worth. Most bond elections do affect all residents. Thus, while the Constitution and Statutes of Texas attempt to enfranchise only a limited class of voters in this type of election, it in no way limits the subject matter of the elections to matters concerning only those allowed to vote.

While not required by the challenged Texas constitutional and statutory provisions (state wide), only persons "who pay taxes" may vote in a bond election in the City of Fort Worth (local). Chapter 25, Section 19, Fort Worth City Charter.[11] However, Article VIII, §1 of the Texas Constitution exempts from taxation two hundred fifty dollars worth of household and kitchen furniture per family.

Thus, some persons who do own and render property will simply not be wealthy enough to qualify to vote. In order to vote in a bond election in the City of Fort Worth, one must come from a family with more than two hundred fifty dollars of household goods.

It is true that those who must pay the taxes for the improvements do have a special interest apart from the general public, but the Court in Stewart, v. Parish School Board of St. Charles, 310

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[11] Set forth in full at pages 45-48 Appendix.

F. Supp. 1172 (1970) aff'd mem., 400 U.W. 884 (1970) held that the special interest of property taxpayers is not a compelling state interest.

> "The special interest property taxpayers have in bond elections is not the compelling State interest that would justify excluding a large portion of the electorate that has a substantial stake in public education." 310 F. Supp. at 1181, aff'd mem., 400 U.S. 884 (1970).

d. The classification challenged herein is not necessary to promote the state's interest, if any, of limiting the franchise to those who will pay for the obligations assumed in the election.

The Texas provisions disenfranchise many persons who will have to pay for the improvements voted on. There are many persons otherwise qualified to vote who will not have rendered property for taxation in the year of the election, but who will render property in future years. The tax on that property will be applied to the retirement of the bonds. There are other people who will effectively pay property tax in the form of rent, or overhead added to a seller's cost of goods sold. There are still others who will be deterred from voting because although they haeve rendered some property, they do not understand that these provisions of Texas law require only token rendition of

taxable property as a condition to the right to vote.

The voting laws is no place to require token compliance with the legitimate objective of tax collection, and it is certainly no place for such token compliance when, as here, the law limits the right to vote in an imprecise and easily misunderstood fashion.

Obviously, there is no practical way to enfranchise all persons who will ever be called upon to pay taxes to retire the bonds voted in the election, but that fact does not justify excluding from the franchise many persons who are vitally interested in the outcome of the election.

Clearly, there is a large amount of overkill in these provisions. These provisions are not necessary to promote the state interest of limiting the vote to those who will, in the long run, pay for the obligations. Indeed, these provisions do not even reasonably promote that interest.

e. The interest of the state in limiting the franchise to those who are primarily interested in the outcome of the election is not a compelling state interest.

Even though there is no hint that the challenged voting classification even begins to limit the franchise to those primarily interested in the outcome of the election, such a purpose is not a

compelling one.

This is the same state interest suggested in Kramer v. Union Free School District, supra, and this Court there held that the New York statute was not necessary to promote that interest since many persons vitally interested in the issues voted on were disenfranchised. 395 U.S. 632, 633.

The Court in Stewart v. Parish School Board of St. Charles, 310 F. Supp. 1172 (1970), aff'd mem. 400 U.S. 884 (1970), held that the special interests of property taxpayers is not a compelling state interest. 310 F. Supp. 1181.

The challenged Texas provisions suffer precisely the same infirmity, since the bond elections governed by the five Texas provisions are of vital concern to all voters. These bonds can be used to finance virtually any governmental function.

f. The challenged voting restrictions are not necessary to promote the state's interest, if any, of limiting the franchise to those who are primarily interested in the outcome of the election.

It is difficult to even make an argument that the challenged voting classification limits the franchise, even imprecisely, to persons who are primarily interested in the outcome of the election. Under the facts of the present case, a

person who has no property rendered for taxation may have children who would be benefitted to a great extent by the building of a new library or the improvement of existing facilities. And as has already been pointed out, even though this voter may have no property rendered for taxation, if he pays rent on his house or any other property which is taxable in Texas, he is in effect paying the tax without having any property rendered. To say that a person is less interested, or is not primarily interested, in the outcome of an election such as the one held in this case simply is not true. The further difficulty with such an argument is that any attempt to decide by whatever means who is "primarily interested" in the outcome of an election for something of as much general interest as a library is necessarily highly subjective and speculative.

It is respectfully suggested that the challenged voting classification is not necessary to limit the franchise to persons primarily interested in the outcome of the election. Indeed, it doesn't even begin to so limit the franchise.

4. The clear mandate of Kramer v. Union Free School District and the three cases subsequently based upon it is that these five Texas provisions are unconstitutional.

In Kramer v. Union Free School District, supra, this Court struck down a provision of the New York Education law which

required a voter in school board elections to be either a parent of a child attending school in the district, or the owner or lessee of real property, or the spouse of an owner or lessee.[12]

In Cipriano v. City of Houma, 395 U.S. 701 (1969), a companion case to Kramer v. Union Free School District, this Court held unconstitutional a Louisiana statute which limited the right to vote in utility revenue bond elections to "property owners".[13]

In Phoenix v. Kolodziejski, 399 U.S. 204 (1970) this Court held unconstitutional Arizona statutes and constitutional provisions which limited the right to vote in general obligation bond elections to real property taxpayers.[14]

In Stewart v. Parish School Board of St. Charles, 310 F. Supp. 1172 (1970) aff'd mem., 400 U.S. 884 (1970), a three-judge district court within the Fifth Circuit held that Louisiana constitutional and statutory provisions limiting the right to vote in general obligation bond elections to "property taxpayers" were unconstitutional.[15] The term "property

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[12] See Appendix A for a full text of the statute.

[13] See Appendix B for a full text of this Louisiana statute.

[14] See Appendix C for a full text of the Arizona provisions.

[15] See Appendix D for a full text of these provisions.

taxpayers" included those who pay tax on personal property. This Court affirmed the judgment of the three-judge court in a memorandum opinion, citing Phoenix v. Kolodziejski, supra.

The Kramer doctrine has been applied by the Federal Courts in every subsequent case where the issue of restriction of the franchise in bond elections to property taxpayers has been raised.[16] Without fail, the Courts have held the challenged state provisions unconstitutional. It will be necessary for this Court to overrule Kramer, Phoenix, Cipriano, and Stewart, supra, if these Texas provisions are to be held constitutional.

B. There is no rational basis for Texas' requirement that voters in general purpose bond elections be owners and renderers of taxable property.

The constitutional standard of Harper v. Virginia State Board of Elections,

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[16] Neither Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973) nor Associated Enterprises, Inc. v. Toltec Watershed Improvement District, 410 U.S. 743 (1973) involved bond elections. More fundamentally, both of such cases basically held that when land is virtually the only thing affected by an election, and the impact of the election on land alone is clear, then the franchise may be restricted to real property owners. See II above pp. 40 - 42.

383 U.S. 663 (1966) is best stated in the language of its opinion:

> But we must remember that the interest of the State, when it comes to voting is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Harper v. Virginia State Board of Elections, supra, 383 U.S. 668 (1966).

None of the purported purposes of the Texas voting classification challenged herein meet the rational basis standard laid down by this Court in Harper, supra. Indeed, Judge Woodward, concurring in the opinion of the unanimous court below, analyzed the Texas' voter requirements by applying Harper and found them unreasonable. (Concurring opinion of Judge Woodward below, p. 18a, AG Juris. State.).

1. Texas has no right to encourage disclosure and rendition of taxable property by conditioning the right to vote upon such disclosure and rendition, because that purpose bears no relation to voter qualifications.

It is undoubted that a state has the right to encourage disclosure and rendition of taxable property, just as it has the right to promote highway safety by appropriate legislation. But this does not mean a state is free to withhold the right of its citizens to vote in order to

enforce these goals.

In Harper v. Virginia State Board of Elections, supra, this Court held that a state does not have the right to impose a tax on the right to vote because "(v)oter qualifications have no relation to wealth nor to paying or not paying this or any other tax." 383 U.S. 666. Disclosure and rendition of taxable property has no more relation to voter qualifications than does wealth, highway safety, building codes, or any number of other topics in which the state is otherwise legitimately interested. A state simply is not free to clutter up the voting laws with requirements which have no relation to voter qualifications.

The Attorney General argues that it is immaterial to the right to vote in a bond election in Texas whether one's ownership of property be great or small. This contention is literally correct, if somewhat misleading. Ownership of property alone does not qualify anyone to vote in a bond election in Texas. Property ownership is a necessary but not a sufficient condition to voting. The voter must also have rendered at least a token amount of that property. And in the City of Fort Worth, the voter must be a person "who pays taxes" on property. Under Texas law, a multi-millionaire can render a ten-cent pencil for taxation and thereby become qualified to vote in a bond election. This property ownership and rendition requirement is said to be so petty, like the poll tax struck down by this Court in Harper v. Virginia State Board of Elections,

supra, that is constitutes no impediment at all, How could such a petty rendition requirement be of any tax significance to a political sub-division of the State of Texas?

It may be assumed that there is some minimum value of property below which a tax assessor-collector would not render an item. Whether that value would be ten dollars, five dollars, or one cent is purely speculation. But, if there is such a minimum requirement, then this would be tantamount to saying that any citizen who desires to vote must own and render at least that amount of property. And in the City of Fort Worth, a person must own, render, and pay taxes on some minimum amount of property in excess of the two-hundred fifty dollars household goods exemption in order to vote.[17] This court forcefully and completely foreclosed the possibility of any such requirement in Harper v. Virginia State Board of Elections, supra:

> We say the same whether the citizen otherwise qualified to vote, has a dollar fifty cents in his pocket or nothing at all, pays the fee or fails to pay it.***The degree of the discrimination is irrelevant. Harper, supra, 383 U.S. at 668 (1966).

2. Texas has no right to limit the franchise to those who will pay

[17] Exemption is contained in Art. VIII, §1 Texas Constitution.

> for the obligations assumed in the bond election because this purpose bears no relation to voter qualifications.

The fact that a person may or may not have to pay the taxes which fund an issue on which he is voting may influence how he wishes to vote. But it has no bearing on his ability to intelligently participate in the electoral process. Therefore, this purpose also fails to meet the constitutional standard of Harper v. Virginia State Board of Elections, supra.

The Texas Supreme Court in Montgomery Independent School District v. Martin, 464 S.W.2d 638 (Tex. Supp. 1971), upheld the challenged voting classification in this case for the reason that, among others, "one who is willing to vote for and impose a tax on the property of another should be willing to assume his distributive share of the burden." Montgomery, supra, 464 S.W.2d at 638. The Texas Supreme Court is mistaken. These Texas laws do not encourage a citizen to assume his distributive share of the tax burden. A multi-millionaire who renders a ten-cent pencil for taxation may vote, but the tax on that item is hardly his distributive share of the tax burden.

The Attorney General argued in his Jurisdictional Statement that only property owners will ever be called upon to repay the bonded indebtedness. That allegation would be more correctly stated that only persons who are rendering property owners during the years the bonds

are paid off, not at the time of the election, plus all those who pay indirect taxes by purchasing items or services from rendering property owners, will ever by called upon to repay the bonded indebtedness. That group would contain almost everyone alive at the time of the bond election whether they were permitted to vote or not, except for those persons who have expired awaiting the final resolution of this litigation.

3. Texas has no right to limit the franchise in bond elections to those who are primarily interested in the outcome of the election because this purpose bears no relation to voter qualifications.

Assuming arguendo that the challenged voting classification does somehow roughly limit the franchise to those primarily interested in the outcome of an election, that purpose bears only a speculative relationship to the ability or potential of a person to exercise his franchise intelligently. The Attorney General has suggested that it is rational for the Texas Election laws to exclude non-renderers in tax bond elections since such persons have no incentive to vote either cautiously or intelligently. He says that non-renderers have no reason to vote against any such tax proposal. However, it would appear that the following persons would conceivably have ample reasons for voting against such proposals:

1. Any non-renderer who anticipates owning property in the future and becoming a renderer, since tax bonds take many years to pay off;
2. Persons who have rendered property for taxation, but who do not desire to have their right to vote based upon their rendition or non-rendition of property for taxation, or who may be unwilling to state that they have property rendered for the purpose of gaining access to the voting booth;
3. Citizens who have a direct interest and concern as to whether or not the particular item for which the bond election was being held is desirable.

In the instant case, 1132 of the 4880 non-renderers voting on the library bonds voted against that proposition. (Stip. #47, pp. 86, 87 App). There is no proof on this record that those 1132 non-renderers had "no reason" for voting against the proposition. It is reasonable to assume that such persons were, in fact, quite intelligent and realized that their vote would increase the tax burden upon themselves as well as all other citizens of the City of Fort Worth.

Moreover, this Court noted in Phoenix, supra, that such "...persons excluded from the franchise have a great interest in approving or disapproving municipal improvements..." Phoenix, supra, 399 U.S. at 210 [Emphasis added]. What quality does a rendering property owner have which makes him uniquely qualified to determine whether the City of Fort Worth

shall build a $6.8 million library?

The requirement of property ownership is confusing to many citizens who in daily life equate the term "property" with the term "real property". The Attorney General's dual box election procedure has added greatly to the confusion, and the lengthy explanations appearing in local newspapers in the City of Fort Worth prior to each bond election do nothing to clarify the situation in the minds of most voters. Many voters, upon realizing that there must be some complication requiring a two-column front page story attempting to explain who may vote, and where, must simply give up and decide not to vote. Virtually no voter can have guessed that the property rendition requirement is merely a token requirement.

4. In deciding whether the Texas voter classification meets the constitutional standard of Harper v. Virginia State Board of Elections, the degree of discrimination is irrelevant.

The Texas Supreme Court has stated that the challenged voting scheme is no impediment to anyone who really wants to vote.[18]

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[18] "It is the contention of the Attorney General, and we agree, that voter qualifications of ownership under the Texas constitutional and statutory provisions stated above, as interpreted by our decisions, are so universal as to constitute no impediment to any elector who really desires to vote in a bond election. A voter is qualified if he renders any kind of property of any value, and he need not have actually paid the tax." Montgomery Independent School District v. Martin. 464 S.W.2d 638 at 640 (Tex. Sup. 1971).

This argument was emphatically answered in Harper v. Virginia State Board of Elections, supra:

> We say the same whether the citizen, otherwise qualified to vote, has $1.50 in his pocket or nothing at all, pays the fee or fails to pay it. 383 U.S. 668.[19]

[19] "To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant." Harper v. Virginia State Board of Elections, supra, 383 U.S. 668 (1966).

II. THE COMPELLING STATE INTEREST TEST, NOT THE RATIONAL BASIS TEST, IS THE CONSTITUTIONAL STANDARD APPLICABLE TO THE CASE AT BAR.

The Attorney General has suggested Salyer Land Co. v. Tulare Lake Basin Water Storage District, 419 U.S. 719 (1973) as authority for refusing to apply the compelling state interest test in the case at bar. That case is distinguishable in several fundamental ways from both the case at bar and Phoenix, supra. The Water Storage District involved in Salyer Land Co., supra, had as its primary purpose the acquisition, storage, and distribution of water for farming. The District had no other general services which it provided such as schools, housing, transportation, utilities, roads, or any other type of service ordinarily furnished or financed by a municipality. Therefore, the restriction of the franchise to land owners within the District had the effect of limiting the ballot to those persons primarily affected by the outcome of the election. In the case at bar, as well as in Phoenix, by no reach of the imagination can it be suggested that the property ownership requirement restricted the vote to persons primarily interested in the outcome of the election. No logic or experience indicates that only property owners have a significant interest in such things as libraries, parks, police and public safety buildings, playgrounds and sewer systems.

Moreover, in Salyer, supra, all the costs of the District's projects were

assessed against the land in proportion to the benefits received. Just the opposite obtains in the case at bar. The Texas classification scheme in no way distributes the burden of taxation proportionately between those who receive the most and the least benefit from the outcome of the election, or from the operation of the issue voted on in the election. Thus, this Court in Salyer held that, by reason of the Water District's special limited purposes and its disproportionate effect upon the activities of land owners as a group, the statute there involved did not violate the Equal Protection Clause.[20]

Associated Enterprises Inc. v. Toltec Watershed Improvement District, 410 U.S. 743 (1973), decided the same day as Salyer, supra, is also urged as a basis for this Court refusing to apply the compelling state interest test. That case is also clearly distinguishable from Phoenix, supra, and the case at bar, since, like Salyer, supra, it involved a special purpose district which had a disproportionate effect on landowner's as such within the district. The operation of the watershed district in that case was conducted through special projects, assessments being made on the land for any benefits received, and such assessments constituting

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[20] Also, Salyer, supra, did not involve a bond election but rather involved the election of directors to the Board of Governors for the Water District.

a lien upon the land itself until paid. The persons primarily affected by the outcome of the election were easily identifiable. These same persons were also liable for payments in direct proportion to the benefit they received. This court held that the state could rationally give landowners the exclusive right to vote.

The Appellant has asserted that the only distinction between the non-landowner resident's relationship to the elections in Salyer and Associated Enterprises compared with the relationship of the non-rendering appellees to the tax bond election is the difference between a "special purpose district" and a special purpose bond election. That assertion of the Attorney General is demonstrably false. The classificatory schemes involved in Salyer and Associated Enterprises successfully identified and isolated those persons who were almost exclusively affected by the operations of the special purpose district, to-wit: landowners. If there were to be an analogy between Salyer and Associated Enterprises and the case at bar, then the Texas classificatory scheme would have to somehow limit the franchise to those persons almost exclusively affected by the outcome of the bond election. It does not do so. There is simply no manner, rational or irrational, in which property ownership or rendition of property for taxation may be related to the use of a public library.

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) is also urged as a basis for this Court to apply

the traditional rational basis test in the case at bar, since this Court there decided to "restrain the expansion" of the fundamental rights analysis in equal protection cases. If use of the compelling state interest test in the case at bar constitutes an "expansion" of the analysis of this Court in Phoenix, supra, why has the Attorney General not suggested to this Court in what respect an application of that test herein would constitute an "expansion"? As pointed out in Point III A below, there is simply no substantial distinction between Phoenix, supra, and the case at bar, and application of the compelling state interest test to the case at bar could not conceivably be viewed as an "expansion" of the fundamental rights analysis. However, the failure of this Court to apply the compelling state interest test in the case at bar would overrule this Court's decisions in Phoenix, supra, Kramer, supra, Cipriano, supra, and Stewart, supra.

If the Attorney General is asking this Court to overrule those four cases, he should say so. The Attorney General has suggested that one of the important facts to this Court in Salyer, supra, was that lessees could bargain with their lessors for the franchise by proxy. Is the Attorney General suggesting that there is some provision in Texas law which permits voting by proxy in general obligation tax bond elections? If he is, he should cite the relevant provisions to this Court. Counsel for appellees have uncovered no such provisions.

Appellant contends that Judge Thornberry, author of the memorandum opinion below, fails to consider that the general obligation tax bond election in Texas will have a direct and disproportionate effect on property owners. He cites Salyer, supra, as the authority for that proposition. Salyer, supra, simply is not analagous, since in that case virtually the only thing affected by the election was land. In general obligation tax bond elections, land and property is one of the least significant things affected. The most significant thing affected is people. Additionally, the Attorney General's analysis makes no allowance whatsoever for the indirect payment of taxes, nor for persons who subsequently render property for taxation.

If the Attorney General desires for this Court to apply the rational basis test in deciding the case at bar, why does he not devote at least two paragraphs in his brief to discussing the rational basis test set forth in Harper under the facts of the instant case? It is respectfully submitted that his failure to do so is based upon his realization that even under the traditional rational basis test, these challenged Texas provisions would completely fail to pass constitutional muster. These restrictions have no relationship whatsoever to the intelligent use of the ballot. Judge Woodward below specifically based his concurrence upon Harper, supra, in which this Court struck down a poll tax under the rational basis standard for the reason that such tax bore no relationship to the intelligent use of

the ballot. Neither does property ownership in general purpose bond elections.

III. THE CASE AT BAR IS FACTUALLY INDISTINGUISHABLE FROM THE DECISION OF THIS COURT IN PHOENIX V. KOLODZIEJSKI.

In Phoenix v. Koloziejski, 399 U.S. 204 (1970), this Court held unconstitutional Arizona statutes and constitutional provisions which limited the right to vote in general obligation bond elections to real property taxpayers.

A. The facts of Phoenix v. Kolodziejski are closely analogous to those of the case at bar.[21]

The five fundamental points of comparison between Phoenix, supra, and the case at bar demonstrate that there is no substantial distinction between the two cases.

1. Type of Election:

Both Phoenix, supra, and the case at bar involve bond elections.

2. Type of Property:

In Phoenix, supra, the franchise was limited to real property taxpayers, while in the case at bar the franchise is limited to owners of property which is rendered for taxation. The term "property" includes all types of property, real, personal or mixed. The distinction between real property and other types of

[21] See Appendix C for a full text of the Arizona provisions there held unconstitutional.

property is important for many purposes, but certainly the lack of ownership or rendition of personal property constitutes no greater reason to deny the franchise to an otherwise qualified voter than does lack of ownership of real property.

3. Type of Bond:

Both Phoenix, supra, and the instant case involve general obligation bonds.

4. Purpose for Which Bond Money Is Spent:

In Phoenix, supra, the general obligation bonds were to be issued for the purpose of financing various municipal improvements, such as city sewer system, parks, playgrounds, police and public safety buildings, and libraries. In the case at bar it is undisputed that general obligation bonds can be used to finance almost any type of public facility. The two issues involved in the April 11, 1972 City of Fort Worth bond election were a $3 million transportation bond issue and a $6.8 million library bond issue. Clearly the bond issues involved in both instances affect virtually all of the citizens of the respective communities and would be of general interest to all. Phoenix, supra, held that the difference between the interests of property owners and the interests of non-property owners on issues such as these is not great enough to justify excluding the

non-property owners from voting. That holding is equally applicable to the case at bar.

5. Debt Service Requirements:

In Phoenix, supra, the stipulated facts established that it was anticipated that more than half the debt service requirement on the bonds at issue would be satisfied not from real property taxes, but from revenues of other local taxes paid by non-property owners as well as other local taxes paid by persons who own real property. In the case at bar the secretary of the City of Fort Worth testified by stipulation that the principal and interest on general obligation tax-supported bonds issued by the city would be paid solely from the proceeds derived from taxes levied, assessed, and collected from persons who own real, personal or mixed property which has been duly rendered for taxation. (Stip. #42, pp. 80-82, App.) Thus, there is a distinction between the two cases, However, this court spoke directly to just that distinction in Phoenix, supra, and made it clear that such a distinction would not change the result at all.

> ...the justification for restricting the franchise to the property owners seems to be strongest in the case of a municipality which, unlike Phoenix, looks only to property tax revenues for servicing general obligation

> bonds. But even in such a case the justification would be insufficient. Property taxes may be paid initially by property owners, but a significant part of the burden of each year's tax on rental property will very likely be born by the tenant rather than the landlord since, as the parties also stipulated in this case, the landlord will treat the property tax as a business expense and normally will be able to pass all or a large part of this cost on to the tenants in the form of higher rent. Since most city residents not owning their own homes are leasees of dwelling units, virtually all residents share the burden of property taxes imposed and used to service general obligation bonds. Moreover, property taxes on commercial property, much of which is owned by corporations having no vote, will be treated as a cost of doing business and will normally be reflected in the prices of goods and services purchased by non-property owners and property owners alike. [Emphasis Added] Phoenix v. Kolodziejski, supra, 399 U.S. at pages 210, 211.

> Precisely the same situation obtains in the case of persons owning substantial personal or mixed property who pass the taxes on to consumers and other persons. The likelihood of passing on taxes to consumers in the case of personal property is perhaps stronger. In fact the proposition that property taxes are passed on through the sales of personal property and goods and services is specifically recognized in the above quotation from this Court's opinion in Phoenix, supra.

It is respectfully submitted that there is simply no substantial distinction between Phoenix, supra, and the case at bar.

B. In 1970 this Court summarily affirmed the judgment of a Three-Judge District Court in Parish School Board of the Parish of St. Charles v. Stewart, citing Phoenix v. Kolodziejski, on the basis of facts closely analogous to those of the case at bar.

On February 25, 1970, a three-judge district court within the Fifth Circuit held that Louisiana provisions restricting eligibility to vote in bond elections to property taxpayers violated the Equal Protection Clause. Stewart v. Parish School Board of the Parish of St. Charles, 310 F. Supp. 1172 (EDLa....1970), aff'd mem. 400 U.S. 884 (1970). The Louisiana provisions

there involved[22] required that political subdivisions could issue bonds only if the bonds were approved by a majority in number and in amount of property of the taxpayers who voted in the election. While the requirement of approval by a majority in amount of property of the Louisiana voting classification is different from those involved in Phoenix, supra, and in the case at bar, the argument for upholding the classification in Stewart, supra, would be stronger than the argument for upholding the classification in Phoenix, supra, or the case at bar. This is so because in Stewart, supra, there was some attempt to make the weight of each voter's vote proportional to his potential tax liability as the result of casting his vote. On the other hand in Phoenix, supra, and in the case at bar, once a voter is on the rolls in any amount, he is permitted to vote.

The three-judge panel in Stewart, supra, recognized the term "property" as used in the challenged Louisiana provisions included personal property, and thus specifically held that the distinction between personal and real property in bond election cases is of no significance. Moreover, the Court there took judicial notice of the fact that in Louisiana few persons pay any personal property taxes, and that those who do usually pay them based upon the value of their automobile. It was there noted that while Louisiana law does provide that all property in the state is subject to taxation, that the tax assessors in fact

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[22] See Appendix D herein for a full text of those provisions.

primarily place business, commercial, and corporate personal property (merchandise inventory) on the assessment rolls. Stewart, supra, 310 F. Supp at page 1173, note 3.

The same observation has been made with respect to Texas by tax experts. It has been recognized that Texas is one of a declining number of states which provide that all property is taxable unless specifically exempted by the state constitution. Yudof, "The Property Tax in Texas Under State and Federal Law", 51 Texas L. Rev. 885 at 888 (1973). Professor Yudof observed in that article that

> the net effect is that laws of Texas give little indication of the true size of the tax base. In practice personal property is rarely included - except for automobiles, which some 400 districts tax. (Yudof, supra, at page 889)

He further observes that mortgages, savings accounts, stocks, bonds and the whole panoply of household goods and chattels are largely untouched by the property tax. Yudof, supra, at page 889, note 27.

On November 9, 1970, this court summarily affirmed the judgment in Stewart, supra, citing City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970). Parish School Board of the Parish of St. Charles v. Stewart, 400 U.S. 884 (1970). Thus this Court has had a specific occasion to determine whether the requirement of ownership of personal property would be treated differently than a requirement of real property ownership, and has held that there is no distinction.

C. The Judge below who disagreed with this Court's decision in Phoenix v. Kolodziejski concurred in the unanimous judgment below because he could find no basis for distinguishing this case from Phoenix v. Kolodziejski.

District Judge Brewster below, who concurred in the result reached by the three-judge court, stated in his opinion:

> I relunctantly concur only in the judgment now being entered herein because I am unable to see a substantial distinction between this case on the one hand and City of Phoenix v. Kolodziejski, on the other. My oath of office binds me to follow the decisions of the Supreme Court of the United States whether I agree with them or not. My own views regarding the constitutionality of restrictions on voting here involved are the same as those expressed in the dissenting opinions in Kramer v. Union Free School District, Dunn v. Blumstein, and the City of Phoenix v. Kolodziejski, supra. [Emphasis Added] (Opinion of Judge Brewster, pp. 19a, 20a, AG Juris. State.)

Judge Brewster's final observation at the end of his opinion was as follows:

> I deeply regret that I have been unable to find a legitimate way to distinguish the cases above cited. (Concurring Opinion of Judge Brewster, p. 22a, AG Juris. State.)

On June 23, 1970, this Court announced its decision in Phoenix v. Kolodziejski, 399 U.S. 204 (1970). This Court there held that a 1969 bond election in which the franchise was reserved to property owners was void. Issuance of those bonds was enjoined. In that opinion, this Court stated:

> ***Nor have we been shown that the fourteen states now restricting the franchise have unique problems that make it necessary to limit the vote to property owners. Phoenix v. Kolodziejski, 399 U.S. 212-213 (1970).

Texas is one of those fourteen states.

In the face of the Phoenix decision, the Texas Supreme Court has squarely held that the Texas voting scheme challenged in this suit is not violative of the Equal Protection Clause of the Fourteenth Amendment. Montgomery Independent School District v. Martin, 404 S.W.2d 638 (Tex. Sup. 1971).

Regardless of which constitutional standard is applied, the Texas voter requirement of ownership and rendition of property for voting in general purpose bond elections cannot be upheld.

> For to repeat, wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened and conditioned. Harper v. Virginia State Board of Elections, 383 U.S. 663 at 670 (1966).

CONCLUSION

Therefore, the Texas classificatory scheme limiting the right to vote in general purpose bond elections to rendering property owners is unconstitutional.

PRAYER

Wherefore, Appellees pray that this Court affirm the judgment of the three-judge district court below.

RESPECTFULLY SUBMITTED,

LAW OFFICES OF DON GLADDEN
702 Burk Burnett Bldg.
Fort Worth, Texas 76102

By: _____
DON GLADDEN

By: _____
MARVIN COLLINS

PROOF OF SERVICE

The undersigned, a member of the Bar of this Court, hereby certifies that a copy of the foregoing has this the _____ day of December, 1974, been served upon each counsel of record for appellants and appellees in accordance with Rule 33 of this Court, by depositing the same in a United States mail box, with first class postage prepaid addressed to said counsel at their post office addresses.

DON GLADDEN

APPENDIX A: NEW YORK STATUTES INVOLVED IN KRAMER V. UNION FREE SCHOOL DISTRICT

1. Section 2012, New York Election Law.

A person shall be entitled to vote at any school meeting for the election of school district officers, and upon all other matters which may be brought before such meeting, who is: 1. A citizen of the United States; 2. Twenty-one years of age; 3. A resident within the district for a period of thirty days next preceding the meeting at which he offers to vote; and who in addition thereto possesses one of the following three qualifications:

(a) Owns or is the spouse of an owner, leases, hires or is in the possession under a contract of purchase or is the spouse of one who leases, hires or is in possession under a contract of purchase of real property in such district liable to taxation for school purposes, but the occupation of real property by a person as a lodger or boarder shall not entitle such person to vote, or

(b) Is the parent of a child of school age, provided such a child shall have attended the district school in the district in which the meeting is held for a period of at least eight weeks during the year preceding such school meeting, or

(c) Not being the parent, has permanently residing with him a child of school age who shall have attended the district school for a period of at least eight weeks during the

year preceding such meeting. No person shall be deemed to be ineligible to vote at any such meeting, by reason of sex, who has the other qualifications required by this section.

APPENDIX B: LOUISIANA STATUTES INVOLVED IN CIPRIANO V. HOUMA

1. Article 39: 501 LA. STAT. ANN.

Elections. Except as otherwise provided in special cases, no subdivision may incur any debt, issue any bonds, levy any special tax, or assume any indebtedness unless it has been authorized by vote of a majority in number and amount of the property taxpayers qualified to vote under the constitution and laws of this state who vote at an election hereunder. The governing authority of any subdivision may call a special election for any of these purposes at any time; and it shall call an election for any of these purposes when requested to do so by the petition in writing of one-fourth of the property taxpayers eligible to vote at the election.

2. See Also Article 33: 4258 LA. STAT. ANN.

Election to authorize the issuance of bonds; validation. Before the resolution authorizing the issuance of bonds under this Subpart is adopted by the governing body, the question of the issuance of the bonds shall be submitted and approved at either a special or general election which shall be ordered, conducted and canvassed

in accordance with either of the following election procedures, at the discretion of the governing body;

(1) The question of the issuance of the bonds may be submitted to and approved by votes of a majority in number and amount of the property taxpayers who vote at an election held hereunder. In the event the governing body elects to order a property taxpayers' election, all matters pertaining thereto, including the qualifications of voters and the manner of calling and conducing the election and canvassing and promulgating the results thereof shall be governed by the provisions of Chapter 4, Subtitle II, Title 39.

(2) The question of the issuance of the bonds may be submitted to and approved by a majority of the qualified electors of the municipal corporation who vote at an election held therein substantially in accordance with the general election laws of the state of Louisiana except that the election shall be ordered, conducted, canvassed and notice thereof published by the governing body in accordance with the procedures set forth in Chaper 4, Subtitle II, Title 39, except where inconsistent with the provisions of this section. In the event the governing body elects to order such an election, all qualified resident electors shall be entitled to vote in the election and voters shall not be required to sign a ballot. Voting machines shall be used in the holding of this type of election and assessed valuation shall not be voted in the election.

In the event a property taxpayers' election has heretofore been held and promulgated

approving the issuance of bonds under this Subpart, as contemplated in Subparagraph (1) above, the governing body may proceed with the issuance and sale of such bonds without complying with the provisions of this section and without any further election approval.

All bonds heretofore issued under the provisions of this Subpart are hereby validated, ratified and confirmed and declared to be valid and binding obligations of the municipal corporation in accordance with the terms of their issuance in spite of any one or more irregularities which may have occurred in the passage of this Subpart or question which might be raised as to the constitutionality of any procedural provision of this Subpart. All proceedings heretofore had in connection with the issuance of such bonds are hereby ratified, validated and confirmed.

3. See Also Article 39.508 LA. STAT. ANN.

Qualifications of voters. Only property taxpayers qualified as electors under the constitution and laws of this state are entitled to vote in any election held under the provisions of this Part. The qualifications of taxpayers as voters are those of age, residence, and registration as voters, without regard to sex. There shall be no voting by proxy.

With reference to Part IV of this Chapter if the limits and boundaries of any municipal corporation has been extended and the assessment roll that is to include the property in the extended limits has not already been made for the municipal corporation,

those who have become property taxpayers by the extension of the limits and who are otherwise qualified to vote shall be permitted to vote in the election and the assessed valuation of their property shall be ascertained by reference to the last assessment roll of the parish.

APPENDIX C: ARIZONA STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED IN PHOENIX V. KOLODZIEJSKI

1. Article 7, Section 13 ARIZ. CONST.

Submission of questions upon bond issues or special assessments.

Questions upon bond issues or special assessments shall be submitted to the vote of real property taxpayers, who shall also in all respects be qualified electors of this state, and of the political subdivisions thereof affected by such question.

2. Article 9, Section 8 ARIZ. CONST.

Local debt limits; assent of taxpayers.

No county, city, town, school district, or other municipal corporation shall for any purpose become indebted in any manner to an amount exceeding four per centum of the taxable property in such county, city, town, school district, or other municipal corporation, without the assent of a majority of the property taxpayers, who must also in all respects be qualified electors, therein voting at an election provided by

law to be held for that purpose, the value of the taxable property therein to be ascertained by the last assessment for state and county purposes, previous to incurring such indebtedness; except, that in incorporated cities and towns assessments shall be taken from the last assessment for city or town purposes; Provided, that under no circumstances shall any county or school district become indebted to an amount exceeding ten per centum of such taxable property, as shown by the last assessment roll thereof; and Provided further that any incorporated city or town with such assent may be allowed to become indebted to a larger amount, but not exceeding fifteen per centum additional, for supplying such city or town with water, artificial light, or sewers, when the works for supplying such water, light, or sewers are or shall be owned and controlled by the municipality.

3. Section 9-523 ARIZ. STAT. ANN.

Bond election.

Questions on bond issues under this article shall be submitted to the qualified electors of the municipality. No bonds shall be issued without the assent of a majority of the qualified electors voting at an election held for that purpose as provided in this article.

4. Section 35-452 ARIZ. STAT. ANN.

Election to authorize indebtedness; qualifications of electors.

A. The governing body or board of a

political subdivision enumerated in Section 35-451 may, and upon petition signed by fifteen per cent of its real property taxpayers who are qualified electors thereof shall, order an election by such taxpayers and electors to determine whether such indebtedness shall be authorized.

B. The order for the election in a school district shall be made by the board of supervisors in the county where such election will be held, either upon petition or upon request of the board of school trustees.

C. If a majority of the real property taxpayers who are qualified electors voting at the election vote in favor of creating an indebtedness in an amount exceeding four per cent of the value of the taxable property of the political subdivision, such political subdivision may become so indebted.

5. Section 35-455 ARIZ. STAT. ANN.

Issuance and sale of bonds; call for election.

A. When the political subdivision designated in this article desires to issue bonds or other evidences of indebtedness, the governing body or board thereof may, with assent of a majority of the real property taxpayers who are qualified electors therein voting at the election held as provided by Section 35-454, issue and sell bonds in the amount authorized at the election.

B. The call for the election shall set forth the amount of each bond and the aggregate amount of the bonds, the maximum rate of interest to be paid thereon, when the interest is payable, the number of years such bonds or any series thereof are to run from, the date of such bonds or series and the purposes for which the money derived from the sale of the bonds will be expended.

APPENDIX D: LOUISANA STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED IN PARISH SCHOOL BOARD OF THE PARISH OF ST. CHARLES V. STEWART

1. Article 14, Section 14a LA. CONST.

Municipal corporations, parishes and school, road, subroad, sewerage, drainage, subdrainage (waterworks and sub-waterworks) districts, hereinafter referred to as subdivisions of the state may incur debt and issue negotiable bonds, when authorized by a vote of a majority in number and amount of the property taxpayers qualified to vote under the Constitution and laws of this state, who vote at an election held for that purpose after notice published or posted for thirty (30) days in such manner as the Legislature may prescribe, and the governing authorities of such subdivisions shall impose and collect annually, in excess of all other taxes, a tax sufficient to pay the interest annually or semi-annually and the principal falling due each year, or such amount as may be required for

sinking fund necessary to retire said bonds at maturity.

2. Article 39-508 LA. STAT. ANN.

Qualifications of voters.

Only property taxpayers qualified as electors under the constitution and laws of this state are entitled to vote in any election held under the provisions of this Part. The qualifications of taxpayers as voters are those of age, residence, and registration as voters, without regard to sex. There shall be no voting by proxy.

With reference to Part IV of this Chapter if the limits and boundaries of any municipal corporation have been extended and the assessment roll that is to include the property in the extended limits has not already been made for the municipal corporation, those who have become property taxpayers by the extension of the limits and who are otherwise qualified to vote shall be permitted to vote in the election and the assessed valuation of their property shall be ascertained by reference to the last assessment roll of the parish.

Supreme Court, U. S.
FILED
OCT 24 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

No. 73-1723

JOHN L. HILL, Attorney General of Texas,
Appellant,

v.

MICHAEL L. STONE, DOROTHY I. ELLIS, JAMES D. HENDERSON, PAT CROWLEY and MARJORIE M. WATSON;
THE CITY OF FORT WORTH, TEXAS, a Municipal Corporation; R. M. STOVALL, its Mayor; S. G. JOHNDROE, JR., its City Attorney; ROY A. BATEMAN, its City Secretary; and the MEMBERS OF THE CITY COUNCIL thereof, *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

Brief of Appellees, the City of Fort Worth, Texas, a municipal corporation; R. M. Stovall, its Mayor; S. G. Johndroe, Jr., its City Attorney; Roy A. Bateman, its City Secretary; and the Members of the City Council thereof

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To: The Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This is an appeal from the judgment of a Three-Judge Court for the Northern District of Texas dated March 25, 1974, in Cause No. CA-4-1975, styled Michael L. Stone et al., Plaintiffs, v. The City of Fort Worth et al., Defendants, 377 F.Supp. 1016.

OPINIONS BELOW

The Memorandum Opinion of the Three-Judge Court dated March 25, 1974, declared unconstitutional Article VI, §§ 3 and 3a, of the Texas Election Code, and Section 19, Chapter XXV of the Fort Worth City Charter. Same is printed in Appendix A of the Jurisdictional Statement at pages 6a-27a. The decision of the Three-Judge Court is in direct conflict with the decision of the Supreme Court of Texas, rendered in 1971, in *Montgomery Independent School District v. Crawford Martin, Attorney General of Texas*, 464 S.W.2d 638, which decision upheld the validity of Article VI, § 3a, of the Texas Constitution.

Notice of appeal of these defendant-appellees was timely filed in the United States District Court for the Northern District of Texas, Fort Worth Division, on April 17, 1974. (Appendix, pp. 2-3)

JURISDICTION

As stated by appellant, this is a direct appeal as authorized by 28 U.S.C. § 1253 from a judgment by the Three-Judge Court permanently enjoining and prohibiting defendant-appellees herein, "their respective agents, servants, employees and successors," from giving any force or effect to Article VI, §§ 3 and 3a, of the Texas Constitution; Articles 5.03, 5.04 and 5.07 of the Texas Election Code; and Section 19 of Chapter XXV of the Fort Worth City Charter "insofar as they are now constitutionally invalid, in assessing the validity of votes cast in Fort Worth's April 11, 1972, election by persons who had not rendered taxable property in such City for taxation." (Appendix C, Jurisdictional Statement) These defendant-appellees were mandatorily enjoined and required to "consider Proposition Two (library bonds) to have been approved by the voters participating in that election," irrespective of whether or not such voters were renderers or non-renderers. The State statutory and constitutional provisions involved generally require that when an election is held by any political subdivision or defined district or municipal corporation

> " *** for the purpose of issuing bonds or otherwise lending credit, or expending money or assuming any debt, only qualified electors who own taxable property in the state, county, political subdivision, district, city, town, or village where such election is held, and who have duly rendered the same for taxation shall be qualified to vote *** ." (Article 5.03)

The provisions of the Home-Rule Charter of the City of Fort Worth struck down by the lower court provide as follows:

> "Section 19. Issuance and Sale of Bonds. The City Council shall have authority to provide for the issuance and sale of bonds for permanent improvements and for any other legitimate municipal purpose as may be determined by the City Council; but no bonds shall be issued to fund any overdraft or indebtedness incurred for current expenses of the city government, or any subdivision thereof. ***
>
> **"No bonds shall be issued unless authorized by ordinance, which** ordinance **shall provide an adequate fund from the taxes for the payment of the**

annual interest and sinking fund of not less than two per cent per annum for the ultimate redemption of such bond issue, and such ordinance shall become effective without the necessity of publication. Provided, that **no bonds shall be issued, nor bonded debt created, unless** authority therefor shall first be **submitted to the qualified voters who pay taxes on property situated within the corporate limits of the City of Fort Worth;** and, if a majority of the votes cast at such election are in favor of the issuance of such bonds, then such issue shall be made; but, should the majority of the votes cast at said election be against the proposition, then such bonds shall not be issued. *** The said bonds when issued shall be submitted to and approved by the Attorney General of the State of Texas, as required by the statutes of this State, before being offered for sale in the market." (Emphasis supplied) (Appendix D, Jurisdictional Statement, pp. 5d-6d)

The judgment of the Three-Judge Court dated March 25, 1974, is printed in Appendix A of the Jurisdictional Statement at pages 1a-4a.

QUESTION PRESENTED BY THE APPEAL

The following question is presented by the appeal:

> Are Sections 3 and 3a of Article VI of the Texas Constitution; Articles 5.03, 5.04 and 5.07 of the Texas Election Code; and Section 19, Chapter XXV of the Charter of the City of Fort Worth, which limit the franchise in general obligation, tax-supported bond elections to persons who own real, personal or mixed property which has been rendered for taxation, constitutionally invalid restrictions inconsistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

STATEMENT OF THE CASE

This case arises out of a bond election held by the City of Fort Worth on April 11, 1972, at which two propositions were submitted to the voters: Proposition No. 1 provided for approval or non-approval by the voters of bonds for the purchase of the equipment of a bus transportation system; Proposition No. 2 provided for approval or non-approval by the voters of bonds for a new central library facility. (Ordinance No. 6644, Appendix, pp. 58-61)

At that election the following votes were cast and recorded on the Propositions:

	Owners of Property Rendered For Taxation	Non-Renderers	Total
Proposition No. 1 (Transportation, $3,000,000)			
For	13,466	4,094	17,560
Against	9,834	850	10,684
Proposition No. 2 (New Central Library, $6,860,000)			
For	10,849	3,758	14,607
Against	12,234	1,132	13,366

The case was submitted on "facts established by stipulation" as set forth on pages 19 through 43, in-

clusive, of the Pre-Trial Order rendered and signed November 8, 1972, which facts established by stipulation are printed as Appendix D in the Jurisdictional Statement and are set forth in the Appendix at pages 38-87. Judgment was rendered on March 25, 1974, granting plaintiff-appellees' every wish. This Court noted probable jurisdiction October 15, 1974.

STATEMENT, ARGUMENT AND AUTHORITIES

THE LIMITING OF A VOTING FRANCHISE TO RENDERED PROPERTY OWNERS IS NOT AN UNREASONABLE, ARBITRARY OR CAPRICIOUS CLASSIFICATION IRRECONCILABLY IN CONFLICT WITH THE FOURTEENTH AMENDMENT.

Among the "Facts Established by Stipulation" were the following:

> "38. That all of the bonds proposed to be issued under Proposition No. 2 (Library Bonds) would be general obligation, tax-supported bonds.
>
> "39. **That the principal of and interest on general obligation, tax-supported bonds** issued and sold by the City of Fort Worth to bona fide purchasers for value **are paid solely from the revenues from taxes levied, assessed and collected by the City of Fort Worth from persons who own real, personal or mixed property which has been rendered for taxation.**
>
> "40. That if defendant Roy A. Bateman (Treasurer of the City) were present in court, he would testify under oath that the requirement of rendition of property, personal and mixed, tangible and intangible, is a matter of vital importance and necessity to local taxing authorities by reason of the plain and simple fact that no property is more susceptible of concealment than is personal and mixed, tangible and intangible property; and that the requirement of voluntary rendition and disclosure of such property for purposes of ad valorem taxation is of the utmost importance and vitally necessary for an effective system of ad valorem tax assessment and collection and is directly and inextricably related to the creation of, payment and discharge of tax-supported bond obligations.
>
> "41. That if defendant Roy A. Bateman were present in court, he would testify under oath that the ad valorem tax is the life blood of local government financing and that the increasing burdens of local needs and inflation make ever increasing demands on local governments for additional tax revenues.
>
> "42. That if defendant Roy A. Bateman were present in court, he would testify under oath that **the principal and interest on general obligation, tax-supported bonds issued by the City of Fort Worth are, and will be, paid solely from the proceeds derived from taxes levied, assessed and collected from persons who own real, personal or mixed property which has been duly rendered for taxation;** that the assessed valuation of real (including improvements), personal and mixed property of the City of Fort Worth for the fiscal year 1970-71 was $1,370,483,290; that of such assessed valuation, real property constituted $1,017,895,540, and personal and mixed property amounted to $352,587,750; that the assessed val-

uation of real (including improvements), personal and mixed property in the City of Fort Worth for the fiscal year 1971-72 was $1,444,024,440; and that of such assessed valuation, real property constituted $1,077,271,500 and personal and mixed property amounted to $366,752,240.

"43. That if defendant Roy A. Bateman were present in court, he would testify under oath that for the year ending September 30, 1970, the City of Fort Worth derived $16,388,154 in taxes from real property rendered and placed on the assessment rolls and $5,676,669 from personal and mixed property rendered and placed on the assessment rolls; that for the year ending September 30, 1971, the City of Fort Worth derived $18,205,947.35 in taxes from real property rendered and placed on the assessment rolls and $6,198,138.73 from personal and mixed property rendered and placed on the assessment rolls; and that more than one-fourth of the total funds derived from taxation in the City of Fort Worth for the years 1970-71 was derived from the taxation of personal and mixed property in said City.

"44. That if defendant Roy A. Bateman were present in court, he would testify under oath that the fiscal year 1971-72 will require that from the funds derived from taxation, the sum of $7,364,524 must be allocated for principal and interest payments on general obligation tax bonds outstanding, which bonds are owned and held by bona fide purchasers for value throughout not only the entire United States but the world, and that the requirement of rendition of personal and mixed property, tangible and intangible, as a prerequisite to vote in a general obligation bond election is a matter of compelling necessity to the City

of Fort Worth by reason of the plain and simple fact that no property is more susceptible of concealment than is personal and mixed, tangible and intangible property.

"That as of December 31, 1971, the outstanding unpaid general obligation tax bond indebtedness of the City of Fort Worth was $92,852,000.

"That the City Council of the City of Fort Worth must provide funds to meet its outstanding general obligation tax bond payments during the fiscal year 1971-72 in the amount of $7,364,524, and that in excess of $1,840,000 of such $7,364,524 must be obtained from taxes derived from the rendition of personal and mixed property in the City of Fort Worth.

"45. That the defendant Roy A. Bateman is fully competent to testify to the above matters of fact contained in Stipulations Nos. 40 through 44, inclusive, and as Treasurer of the City of Fort Worth, he has personal knowledge of such facts." (Emphasis and insert supplied) (Appendix D, Jurisdictional Statement, pp. 24d-28d; Appendix, pp. 78-84)

Plaintiff-appellees' contentions are parallel to those asserting the invalidity of a 60% favorable vote requirement as opposed to the voter requirement of a simple majority to create bonded debt and increase taxes by levying a special tax to pay interest and principal. As a matter of fact, the Texas statutory requirements are nowhere near as restrictive as a 60% favorable vote "requirement" rather than a simple majority.

In this connection, in *Gordon v. Lance*, 403 U.S. 1, 91 S.Ct. 1889, 1891, 29 L.Ed.2d 273 (1971), this

Court held:

> "*Cipriano* was no more than a reassertion of the principle, consistently recognized, that an individual may not be denied access to the ballot because of some extraneous condition, such as race, *e.g.*, Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960); wealth, *e.g.*, Harper v. Virginia State Board of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); tax status, *e.g.*, Kramer v. Union Free School Dist., 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969); or military status, *e.g.*, Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965).
>
> "Unlike the restrictions in our previous cases, the West Virginia Constitution singles out no 'discrete and insular minority' for special treatment. The three-fifths requirement applies equally to all bond issues for any purpose, whether for schools, sewers, or highways. We are not, therefore, presented with a case like Hunter v. Erickson, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969), in which fair housing legislation alone was subject to an automatic referendum requirement.
>
> "The class singled out in Hunter was clear — 'those who would benefit from laws barring racial, religious, or ancestral discriminations,' *supra*, at 391, 89 S.Ct., at 560. In contrast we can discern no independently identifiable group or category that favors bonded indebtedness over other forms of financing. Consequently no sector of the population may be said to be 'fenced out' from the franchise because of the way they will vote. Cf. Carrington v. Rash, *supra*, 380 U.S., at 94, 85 S.Ct. at 779.
>
> * * *

> "The Federal Constitution itself provides that a simple majority vote is insufficient on some issues; the provisions on impeachment and ratification of treaties are but two examples. Moreover, the Bill of Rights removes entire areas of legislation from the concept of majoritarian supremacy. **The constitutions of many States prohibit or severely limit the power of the legislature to levy new taxes or to create or increase bonded indebtedness, thereby insulating entire areas from majority control. Whether these matters of finance and taxation are to be considered as less 'important' than matters of treaties, foreign policy or impeachment of public officers is more properly left to the determination by the States and the people than to the courts operating under the broad mandate of the Fourteenth Amendment. It must be remembered that in voting to issue bonds voters are committing, in part, the credit of infants and of generations yet unborn, and some restrictions on such commitment is not an unreasonable demand.** That the bond issue may have the desirable objective of providing better education for future generations goes to the wisdom of an indebtedness limitation; **it does not alter the basic fact that the balancing of interests is one for the State to resolve.**
>
> **"Wisely or not, the people of the State of West Virginia have long since resolved to remove from a simple majority vote** the choice on certain decisions as to what indebtedness may be incurred and what taxes their children will bear.
>
> * * *
>
> **"That West Virginia has adopted a rule of decision, applicable to all bond referenda, by which the strong concensus of three-fifths is required**

before indebtedness is authorized, does not violate the Equal Protection Clause or any other provision of the Constitution." (Emphasis supplied)

Even more limiting are those statutes restricting the franchise to the owners of the lands subject to assessment for drainage improvements. In this connection, in *Wallegham v. Thompson*, 185 N.W.2d 649, 654 (N.D.1971), the court held as follows:

> " *** The statutory formula for voting rights in proportion to the anticipated assessment that land in the drainage district may be subjected to distributes voting influence fairly among the landowners. **Those landowners who own more land will be burdened more and have more at stake.**
>
> "In State v. Gamble Skogmo, Inc., 144 N.W.2d 749, 752 (N.D.1966), in paragraph 1 of the syllabus, we said:
>
> 'The Fourteenth Amendment to the United States Constitution permits the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than they affect others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective.'
>
> "We cannot say that the voting formula enacted by the legislature is wholly irrelevant to the achievement of the State's objective. Indeed, we are of the opinion that it is entirely relevant.
>
> "In State v. Gamble Skogmo, Inc., *supra*, we also said that a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it; and that only invidious discrimination is prohibited by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.
>
> "The statutory voting formula can be reasonably justified, and if it is discriminatory it is not invidious. It stands upon reason. It is not arbitrary." (Emphasis supplied)

To the same general effect was the holding in *Beller v. Kirk*, 328 F.Supp. 485, 486 (S.D.Fla.1970), aff'd., 403 U.S. 925, 91 S.Ct. 2248, wherein the court held:

> "The State has the right and duty to establish reasonable regulations for the conduct of elections for state offices. There is no constitutional right to have one's name printed on the ballot. See Fowler v. Adams, *supra*. Plaintiff could be elected to office by a write-in vote without being a member of any political party, much less a majority party. Both Fowler v. Adams, *supra*, and Wetherington v. Adams (N.D.Fla.1970), 309 F.Supp. 318, conclusively answer plaintiff's arguments with respect to equal protection and any Fourteenth Amendment due process claim based upon an assertion that the right to run for office is a 'property right.' Judicial notice was taken that the right to qualify as a write-in candidate may be considered to be illusory in an equal protection context but that there have been successful and near-succesful write-in candidates in general elections in Florida within recent years. While not having one's name printed on the ballot may put him to some disadvantage in relation to one whose name does appear on the ballot, this does not constitute invidious discrimination, nor is it unconstitutional.
>
> "We specifically hold that the Florida Statutes here attacked are reasonable, and are not arbitrary, discriminatory or unconstitutional."

Constitutional adjudication should not be based upon the synthetically tenuous basis supporting the Memorandum Opinion, in which two-thirds of the lower court did not join, but merely concurred in the judgment. We must keep in mind that **the entire electorate of the State of Texas** in adopting the constitutional provisions of Article VI, §§ 3 and 3a; **the Texas Legislature** in adopting its civil statutes, Articles 5.03, 5.04 and 5.07 of the Election Code; and **the electorate of the City of Fort Worth** in adopting its Home-Rule Charter provision, Section 19 of Chapter XXV, could quite reasonably have concluded that no general obligation, tax-supported bonds should be issued (which bonds create a specific, direct tax lien on each item of property rendered and on the tax rolls) unless the owners and renderers thereof are permitted a dominant voice in the election to determine whether or not such bonds should be issued and whether or not such additional tax should be levied and such lien created and fixed; and further, since as a matter of uncontroverted fact

> " *** the principal and interest on general obligation, tax-supported bonds issued by the City of Fort Worth are, **and will be, paid solely from the proceeds derived from taxes levied, assessed and collected from persons who own real, personal or mixed property which has been duly rendered for taxation;** *** ." (Emphasis supplied) (Facts Established by Stipulation, No. 42, Jurisdictional Statement, pp. 25d-26d; Appendix, pp. 80-82),

the reasoning of this Court in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719, 93 S.Ct. 1224, 1231, 35 L.Ed.2d 659 (1973), is applicable to the state of facts in the case at bar:

> " *** **The California Legislature could quite reasonably have concluded that the number of landowners and owners of sufficient amounts of acreage whose consent was necessary to organize the district could not have subjected their land to the lien of its possibly very substantial assessments unless they had a dominant voice in its control.** Since the subjection of the owners' lands to such liens was the basis by which the district was to obtain financing, the proposed district had as a practical matter to attract landowner support. **Nor, since assessments against landowners were to be the sole means by which the expenses of the district were to be paid, could it be said to be unfair or inequitable to repose the franchise in landowners but not residents.** Landowners as a class were to bear the entire burden of the district's costs, and the State could rationally conclude that they, to the exclusion of residents, should be charged with responsibility for its operation. We conclude, therefore, that nothing in the Equal Protection Clause precluded California from limiting the voting for directors of appellee district by **totally excluding those who merely reside within the district."** (Emphasis supplied)

SINCE THE OUTSTANDING, UNPAID GENERAL OBLIGATION TAX BOND INDEBTEDNESS OF THE CITY OF FORT WORTH WAS ALREADY $92,852,000 AS OF DECEMBER 31, 1971, AND SINCE THE RENDERING PROPERTY OWNERS HAD A DIRECT FINANCIAL INTEREST IN CONTROLLING THEIR INDEBTEDNESS AND TAXATION, THE TEXAS STATUTES AND THE CITY'S CHARTER PROVISION WERE REASONABLE LIMITATIONS.[1]

Surely it cannot be considered unreasonable for the electorate of the State of Texas and the City of Fort Worth and the Legislature of the State of Texas to adopt such measures as the rendition requirement for the salutary purpose of keeping indebtedness and taxation within controllable limits. We must keep in mind that the **same rendering voters** that turned down the $6,860,000 additional central library bond proposition voted by a wide margin for the issuance of $3,000,000 in general obligation, tax-supported bonds for the purchase of the bus transportation system. (Facts Established by Stipulation, No. 47, Jurisdictional Statement, p. 29d; Appendix, pp. 86-87) This salient fact conclusively demonstrates that the **same voters** made a political and economic choice or judgment to the effect that they were **"for"** levying a special new tax and fixing a lien on their property (real, personal and mixed) for the issuance of $3,000,000 in transportation bonds but were **"against"** levying a special new tax and fixing a lien on their property for the issuance

[1]Facts Established by Stipulation, No. 44, Jurisdictional Statement, pp. 27d-28d; Appendix, pp. 83-84.

of $6,860,000 worth of tax-supported general obligation bonds for an additional central library.

It is understandable that the same voters who were **"for"** the transportation bonds voted **"against"** the additional central library bonds since the rendering taxpayers were already saddled with tax bond payments (required to pay interest and principal on bonds outstanding) for the fiscal year 1971-72 and annually thereafter in the amount of $7,364,524, which amount is almost one-third of the total of $24,404,086.08 to be derived from ad valorem taxation for the year 1970-71. (Facts Established by Stipulation, Nos. 43 and 44; Appendix, pp. 82-84)

Clearly the outcome of the Fort Worth bond election is a classic example of the rendition requirement enhancing voter competence.

Why the Memorandum Opinion manifests such an apparent compulsion and studied effort to encourage debt and to increase taxation is almost beyond comprehension.

The Memorandum Opinion proclaims its own wisdom, virtue and morality while scoffing at that of the electorate of the State of Texas, its Legislature, and the electorate of the City of Fort Worth. For example, the Memorandum Opinion states:

> " *** It is sheer sophistry to say the classes create themselves, or that the voters disenfranchise themselves, when the state requires would-be voters to meet requirements entirely irrelevant to the needs of sound election administration or voter competence.

> "We might add that we suspect the Texas rendering requirement has created a class of citizens who own too little property to merit a vote in bond elections."

Such approach and philosophy mirrors the fallacious argument that ad valorem taxes should only be rendered by and collected from a wealthy minority and further is thoroughly inconsistent with the teachings of this Court in *Salyer*, supra, and in *Associated Enterprises, Inc., et al. v. Toltec Watershed Improvement District*, 410 U.S. 743, 93 S.Ct. 1237, 35 L.Ed.2d 675 (1973). In the latter case, this Court will recall its holding in part as follows:

> "We cannot agree with the dissent's intimation that the Wyoming Legislature has in any sense abdicated to a wealthy few the ultimate authority over land management in that state. The statute authorizing the establishment of improvement districts was enacted by a legislature in which all of the State's electors have the unquestioned right to be fairly represented. Under the act, districts may be formed only as subdivisions of soil and water conservation districts. *Id.*, § 41-354.3. And a precondition to their formation referendum is a determination by a board of supervisors of the affected conservation district, popularly elected by both occupiers and owners of land within the district, that the watershed improvement district is both necessary and administratively practicable. *Id.*, §§ 41-354.7, 41-354.8; Wyoming Conservation Districts Law, Wyo.Stat.Ann. § 11-234 et seq., § 11-243. As in *Salyer*, *supra*, we hold that the State could rationally conclude that landowners are primarily burdened and benefited by the establishment and operation of watershed districts and that it may condition the vote accordingly."

Further, there is absolutely no factual showing in the record of the number of people who render automobiles for taxation; yet, the Memorandum Opinion creates its own facts by concluding, "The record fails to indicate the number of people who render for taxation personalty **other than automobiles,** but we doubt that many do." (Emphasis supplied)

The record does not show that any automobiles were rendered, and as a matter of fact the Tax Assessor-Collector of the City of Fort Worth **has never enforced a policy of requiring renditions on private automobiles in the City!**

The voting qualification as to property rendition established by the electorate of the entire State of Texas with the adoption of Article VI, §§ 3 and 3a, is based upon the undeniable fact that property owners are, in the long run, the people who have to be held directly responsible for not only the creation of, but also any and all increases in the payment of bonded debt; and under all concepts of Athenian democracy, they should have the dominant interest to say whether or not such debt is necessary or desirable.

Under Proposition No. 1 (the transportation bonds), the rendering property owners were asked to determine whether or not an additional tax should be levied and a lien placed upon their real, personal or mixed property for a period of time which may exist for forty years — more than half a lifetime — and by a sub-

stantial majority, they answered in the affirmative. Under Proposition No. 2, the same rendering property owners were asked to determine whether or not such additional tax should be levied and a lien affixed upon their property and, by a substantial majority, they answered in the negative.

One of the reasons for the recent adoption of Public Law 92-512, the Federal Revenue Sharing Bill,[2] 31 U.S.C. § 1221 et seq., was the recognition by the Federal Government of the compelling necessity of avoiding increases in local ad valorem taxation and additional creation of debt at municipal levels. As this Honorable Court well knows, the financial soundness of our municipal governments is essential to our Federal System, and all informed sources admit to the conclusion that municipal governments currently face debt and taxation problems of a most severe nature. One does not have to be prophetic to recognize the plain and simple fact that municipal governments bear the brunt of the most difficult of domestic problems. The Congress recognized such fact in establishing the "State and Local Government Fiscal Assistance Trust Fund," 31 U.S.C. § 1224. At the present time, all local governments are having considerable difficulty in raising the revenue to meet current costs and to cover debt service. Neither the State of Texas nor the City of Fort Worth has any income tax source of revenue.

For many, many years the Federal Government, and more particularly the Congress, has recognized that

[2]*For Legislative History* of P.L. 92-512, see 3 U.S.Cong.&Adm. News '72, pp. 3874-3959.

the interest on the obligations of municipal corporations should be exempt from taxes imposed on gross income. 26 U.S.C. § 103. Further, this Court well knows that the Congress has for many years permitted the deduction from gross income of State and local ad valorem property taxes, thereby presumably reducing the net additional burden of State and municipal taxes on such Federal taxpayers. All of the taxpayers who claim such exemption from Federal taxation are deemed to have rendered their real, personal and mixed property for State and municipal taxes, and obviously they have such property on the tax rolls and have paid their property taxes or they would be unable to claim the Federal income tax exemption.

In erroneously concluding that the requirement of rendition or having property on the tax rolls is not of any compelling State interest and is in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, the lower court has, in effect, vicariously determined that the Federal tax exemption likewise violates the Equal Protection Clause. Under the holding of the lower court, the Congress itself may be guilty of violating the Equal Protection Clause by indirectly aiding State and municipal government ad valorem property taxpayers. Further, the Memorandum Opinion has, in effect, held that the Federal Government is likewise in violation of the Equal Protection Clause by exempting interest on State and municipal bonds from the Federal income tax.

Obviously, Federal income taxpayers claiming an

exemption or deduction for their interest on tax-exempt municipal bonds and their personal, real and mixed ad valorem property tax payments to State and municipal governments, such as the City of Fort Worth, have to meet the Federal Government's requirement of rendition in order to avail themselves of their constitutional and statutory rights to such exemptions and deductions.

We must keep in mind that the Federal Government's income tax rendition requirement is mandatory and that failure so to render subjects the taxpayer to criminal sanctions; whereas, the City's requirement of rendition or having property on the tax rolls is essentially voluntary. Although the constitutional, statutory and charter provisions are mandatory, there is no criminal penalty for failure to comply. Even a cursory examination of the Texas rendition requirements reveals that the qualification as to property rendition established by the electorate both at the State and local level does not disenfranchise anyone. **There is no requirement that any qualified elector pay the taxes;** mere ownership and rendition of real, personal or mixed property satisfies all requirements. Whether or not any individual has sufficient wealth to pay taxes levied or to be levied is irrelevant and not determinative in any way of his right to vote.

In *Montgomery*, supra, at page 641, the Supreme Court of Texas held in part as follows:

> " *** This is the manner in which the Texas Constitution, as approved by the entire citizenry of the state, provides inducement for those who

wish to participate in the decision making process in a School District to assume their rightful portion of the burden they help to create.

"Personal property such as stocks, bonds, cash, automobiles, and livestock furnishes a great deal of the state's taxable property. No class of property is so susceptible to concealment and escape from taxation as personal property. The government faces unending problems in seeking to comply with the Constitutional mandate that 'Taxation shall be equal and uniform.' Art. VIII, Sec. 1, Vernon's Texas Const. There may be other means to reach personal property, but **experience has shown that every means must be pressed into service if the obligations of government are to be spread equally.** This court articulated the correlation between **the rights of citizenship and the obligations of citizenship** in Markowsky v. Newman, 134 Tex. 440, 136 S.W.2d 808 (1940), when we said:

> ' . . . in determining the meaning, intent and purpose of a constitutional provision the history of the times out of which it grew and to which it may be rationally supposed to have direct relationship, the evils intended to be remedied and the good to be accomplished, are subjects of inquiry. . . .
>
> * * * *
>
> 'It might be further safely said that the good sought to be accomplished by this amendment was to induce owners of property to place it upon the tax rolls and become liable for its pro rata share of the taxes levied and assessed by the municipality.
>
> * * * *
>
> 'Moreover, it would be of great benefit to the

taxing authorities to have such rendition of personal property, particularly where such property cannot be easily found by the city authorities.'" (Emphasis supplied)

Plainly and simply, the five plaintiff-appellees in the case at bar, by their disinclination and refusal to render any species of property whatsoever to qualify as voters in ad valorem, tax-supported bond elections, were seeking, under the guise of an academically inspired civil rights crusade, to avoid the mandatory provisions of Article VIII, § 1, of the Constitution of the State of Texas and Article 7145 of the Revised Civil Statutes, **requiring that all property in the State of Texas be rendered and taxed in proportion to its value.**

The challenges in the case at bar do not present a case of first impression. In this connection, defendant-appellees would call to the attention of the Court *City of Fort Worth v. Cureton*, 222 S.W. 531 (Tex.1920), and *Hanson v. Jordan*, 198 S.W.2d 262 (Tex.1946).

The Court will observe that Article VI, § 3a, does not restrict itself to elections held by municipalities as does § 3 of the same Article. § 3a provides in part that when an election is held

> " *** by any county or any number of counties, or any political subdivision of the State, or any political subdivision of a county, or any defined district now or hereafter to be described and defined within the State and which may or may not include towns, villages or municipal corporations, or any city, town or village, for the purpose of issuing bonds or otherwise lending its credit, or spending money or assuming any debt, only qualified electors who own taxable property in the State, county, political subdivision, district, city, town or village where such election is held, and who have duly rendered the same for taxation, shall be qualified to vote *** ."

The obvious reason for the all-inclusive nature of such constitutional provision is that the topography of the State of Texas differs markedly from city to city, from county to county, from district to district, and from region to region. There are literally thousands of cities, towns and villages, water control and improvement districts, navigation districts, hospital districts, junior college districts and other special areas in which those who have rendered their real, personal or mixed property for taxation are frequently called upon to determine through the democratic election process whether or not they can afford to create long term debt and increase their taxation to pay for the construction of special public improvements, and to what extent such public improvements are a matter of public necessity. These are the areas and "defined districts" referred to in Article VI, § 3a, of the Texas Constitution. The only method by means of which these taxpayers can voice their approval or disapproval and protect themselves is in the election booth.

In addition to their interpretation in *Gordon v. Lance*, supra, the principal authorities cited in support of the lower court's decision were thoroughly distinguished and disposed of by the Texas Supreme Court in *Montgomery*, supra. There the court said:

"Several recent decisions of the United States

Supreme Court have invalidated state laws which selectively grant the right to vote and have held those laws violative of the equal protection clause of the Fourteenth Amendment. The court struck down a New York statute which granted the right to vote in a school district election only to those who owned or leased taxable real property in the district or were parents or custodians of children enrolled in the public schools. Kramer v. Union Free School District No. 15, 395 U.S. 621, 23 L. Ed.2d 583, 89 S.Ct. 1886 (1969). The same day the court decided *Kramer*, it also handed down Cipriano v. City of Houma, 395 U.S. 701, 23 L. Ed.2d 647, 89 S.Ct. 1897 (1969). The court held a Louisiana statute unconstitutional because it permitted only property owners to vote on the question of approving bonds that were to be financed exclusively from the revenues of a municipal public utility. In Phoenix v. Kolodziejski, 399 U.S. 204, 26 L.Ed 2d 523, 90 S.Ct. 1990 (1970), an Arizona constitutional limitation of the franchise in bond authorization elections to persons who are qualified electors and also real property taxpayers was held to be a violation of the equal protection clause.

"These precedents constitute the framework for the School District's contention that the Texas constitutional and statutory limitations upon voting rights in a school bond election are also violative of the Fourteenth Amendment. There are significant differences between the three cases cited above and this case. In *Cipriano*, the court held that ownership of property was a restriction which was irrelevant to an election for the approval of bonds that would be financed by revenues of a public utility and not by taxation of property. The case before us does not concern

revenue bonds. In *Kramer* and *Kolodziejski*, only persons who were real property owners were permitted to vote. The Texas law does not restrict voting rights to owners of real property.

"One other case needs discussion. The United States District Court for the Eastern District of Louisiana struck down Louisiana statutes which restricted eligibility to vote in bond elections to property taxpayers and also weighed each elector's vote by the monetary value of his assessed property. Stewart v. Parish School Bd. of Parish of St. Charles, 310 F.Supp. 1172 (E.D.La.1970), aff'd mem. ..... U.S. ....., 27 L.Ed.2d 129, 91 S.Ct. 136. The court said that the affluence of the voter was not such a compelling state interest as to justify the denial of the vote to some and the dilution of the votes of the majority. We do not have that problem in this case. **The weight and force of the vote of the Texas elector who owns a bicycle is no different from that of the elector who owns a herd of cattle.** It is immaterial to the right to vote in a bond election whether one's ownership of property is great or small. DuBose v. Ainsworth, 139 S.W.2d 307 (Tex.Civ.App. 1940, writ dis.).

"The provisions of the Texas Constitution and the Education Code, quoted above, show that the citizens of the Montgomery Independent School District had the right to vote if they owned any kind of property. Article 7145, Vernon's Tex.Civ. Stat. provides: 'All property, real, personal or mixed except such as may be hereinafter expressly exempted, is subject to taxation, and the same shall be rendered and listed as herein prescribed.' Unlike these restrictive voting laws which have been declared unconstitutionally narrow and lim-

ited, the laws in Texas have consistently granted the right to vote in general obligation bond elections to all who own personal property as well as to those who own real property. Texas Public Utilities Corporation v. Holland, 123 S.W.2d 1028 (Tex.Civ.App. 1939, writ dis.). In Handy v. Holman, 281 S.W.2d 356 (Tex.Civ.App. 1955, no writ), the right to vote of forty resident citizens was challenged because immediately before participating in a bond election, they had each rendered personal property valued at $100 for the very purpose of voting in a bond election. The court upheld their right to vote and also said that electors should not be 'parsed' out of their constitutional right to vote by reason of any shortcoming in compliance with statutory requirements concerning the proper and timely rendition of personal property.

"It is the contention of the Attorney General, and we agree, that voter qualifications of ownership under the Texas constitutional and statutory provisions stated above, as interpreted by our decisions, are so universal as to constitute no impediment to any elector who really desires to vote in a bond election. A voter is qualified if he renders any kind of property of any value, and he need not have actually paid the tax.

"The quoted provisions of the Constitution and the Education Code requiring the property owner to duly render his property for taxation have been often construed by the Texas courts in connection with voting rights. Property is 'duly rendered' within the meaning of the Texas Constitution if the property is placed on the tax rolls by the tax assessor instead of by the property owner, Texas Public Utilities Corporation v. Holland, supra,

or by some other person such as a husband, partner, agent, or co-tenant and even though the owner's name may not appear on the tax rolls; Markowsky v. Newman, 134 Tex. 440, 136 S.W.2d 808 (1940); Royalty v. Nicholson, 411 S.W.2d 565 (Tex.Civ.App. 1967, writ ref. n.r.e.); Lucchese v. Mauermann, 195 S.W.2d 422 (Tex.Civ. App. 1946, writ ref. n.r.e.), cert. denied, 329 U.S. 812, 91 L.Ed.2d 693, 67 S.Ct. 633 (1947); Richter v. Martin, 342 S.W.2d 342 (Tex.Civ.App. 1961, no writ); Campbell v. Wright, 95 S.W.2d 149 (Tex.Civ.App. 1936, no writ); or when one makes his rendition out of time and for the very purpose of qualifying as a voter. Markowsky v. Newman, supra; Handy v. Holman, 281 S.W.2d 356 (Tex. Civ.App. 1955, no writ)." (Emphasis supplied)

The tax lien which is levied and placed on the property of renderers when a bond proposition passes and bonds are issued is a brand new special tax for a specially created district each time such an election is held. Such a special election is not related to an exercise of the general powers of government. **The proceeds from the sale of the bonds can only be used for the specific special facility purpose authorized by the electorate,**[3] and the special tax must be levied until such time as all of the special facility bonds are paid off. If the judgment of the Three-Judge Court is allowed to stand, property-rendering voters will have electoral voices so weakened and diluted by allowing unconcerned non-renderers to vote and to place a lien

[3]Sec. 19 of Chapter XXV of the Charter of the City of Fort Worth, which was stricken down by Justice Thornberry, provides in part that "no bonds shall be issued to fund any overdraft or indebtedness incurred for current expenses of the city government, or any subdivision thereof." (Appendix, pp. 45-46)

on the property of the renderers that the latter will be taxed without any direct representation of their interests. Non-renderers do not have a direct tax and lien imposed on their unrendered property.

In the April 11, 1972, bond election, voters considered, in effect, the creation of two special purpose districts, each of which, if created, would impose a separate, new tax on the property renderers of Fort Worth. In *Salyer*, supra, this Court carefully enunciated that by reason of the water storage district's limited purpose and its **disproportionate effect on landowners as a group,** the California laws **did not** deny equal protection by limting the franchise to district landowners, thereby denying the vote to non-landowning residents. The facts in the case at bar are consistent with those in *Salyer*—the disproportionate effect that the creation of a special transportation or library district would have on property renderers individually and as a group offsets the non-renderers' wholly subjective complaint that they are being denied equal protection.

In the bond election of April 11, 1972, the voters of Fort Worth were asked to consider propositions authorizing the creation of two special purpose districts, a special public transportation bus system and a special public library district, the library district being for the sole purpose of constructing a new central library in addition to the present seven branch libraries and the existing central downtown library. Both the renderers and non-renderers apparently decided that a viable bus transportation system was of sufficient

necessity to require approval of the bonds to finance it. However, when the same voters were asked to create additional debt and raise taxes for the issuance of bonds to finance **another** central downtown library, those same voters who would be directly responsible for financing the bonds apparently concluded that the existing central downtown library was sufficient to meet the needs of the public and that the cost of another central downtown library would be an extravagance far exceeding the benefits such library would provide. Our totally altruistic non-renderers, on the other hand, had no apparent concern as to whether or not they could afford an extra new library, especially since they would not have to share directly in its costs. If the votes of these non-renderers must be counted and the extra library constructed, as urged by plaintiff-appellees, the renderers of the City of Fort Worth will, in effect, be disenfranchised and required to make a donation for another central library.

The challenged laws of the State of Texas and the charter provisions of the City of Fort Worth require the rendition of not only real property, but also personal and mixed property.[4] The ad valorem property tax in question, if authorized, is levied on each piece of rendered property until the bonds are paid off. The election laws of the State of Texas require the rendition of only one (1) piece of property, real, personal or mixed, to qualify one to vote in a general obligation, tax-supported bond election. **No amount of property is too small to render for taxation and thereby qualify**

[4]"The Texas law does not restrict voting rights to owners of real property." *Montgomery*, supra, at p. 640.

as a voter. There is no showing in the record that each of plaintiff-appellees herein does not own some piece of property (real, personal or mixed) which under the tax laws of Texas should be placed on the tax rolls and subjected to the property tax. The Court should keep in mind that anyone otherwise qualified who fulfills his or her legal obligation to the State automatically becomes an eligible voter in an ad valorem tax-supported bond election.

Although the tax revenue from each piece of rendered property may seem insignificant to the lower court, collectively this revenue is the basic form of tax support for Texas municipalities. As the Texas Supreme Court said in *Montgomery*, supra, it is imperative that every means of collecting be pressed into service for the collection of property taxes to insure that the tax burden is evenly shared by all citizens. Requiring rendition of property to qualify in a tax-supported bond election is one means of getting property on the tax rolls, especially personalty, which is easily concealed.

In summarily holding that the requirements of the State are "entirely irrelevant to the needs of sound election administration or voter competence," the lower court has opened a veritable Pandora's box of attacks on other limitations of the franchise which also might be characterized as being "irrelevant." In all elections there will be some citizens who are too young to vote or who cannot meet the residency requirements to vote, yet who may be more interested and informed as voters than many of those actually qualified. However, age limitations and residency requirements of the franchise are recognized as necessary for "sound election administration," although we accept the fact that such limitations may, in some instances, be irrelevant to "voter competence." There is no showing in the record that any of the plaintiff-appellees have more than a casual interest in the passage of the library bonds; however, the **financial interest** of the renderers **as a group** is so overriding and their **competence** as voters **as a group** so far surpasses that of non-renderers that failure to limit the vote to rendering property owners would completely ignore the necessity for "sound election administration" as well as "voter competence."

When the lower court opines that the Texas rendering requirement could create a class of citizens who own too little property to merit a vote in bond elections, it either exhibits a basic misunderstanding of the requirement or is legislating. There is **no minimum rendering requirement,** for rendering a kitchen clock would qualify a voter as fully as rendering a herd of cattle. The only amount of property which is "too little" to merit a vote is **no** property, and it is difficult to conjure up a citizen or a class of citizens who individually or collectively owns **nothing.** The challenged provisions disenfranchise no citizen nor class of citizens by requiring that at least a single piece of property, real, personal or mixed, must be rendered to qualify as a voter in general obligation, tax-supported bond elections; rather, by personal inaction each of the complaining citizens has disenfranchised himself by refusing to comply with the statutory provisions.

The lower court bases part of the Memorandum Opinion on the "upward mobility" of our society, which, one can only suppose, refers to the hypothesis that our standard of living may be improving, and, as a consequence, greater numbers of people may become property owners in the future. We assume that this supposition is employed to point out that those citizens who are not now property renderers may become so at some future date and are unconstitutionally denied the franchise by the challenged Texas election laws. Whether or not it is true that our society demonstrates "upward mobility," the argument is fundamentally perishable. First, children merely one day under eighteen years of age are in the same position as the current non-renderers who may be planning to render property some sunny day. During the forty-year limiting period that the bonds may be in effect,[5] the property tax rolls will undergo many changes, and many people who were not eligible to vote for a variety of reasons, such as age and residence requirements, will become liable for the bonds. Furthermore, the results of any election could never be completely representative of the voters in a district during the entire twenty-five or forty year life of such bonds. To compile eligible voter lists, accurately projected into the future, would require nothing less than prophetic ken.

In a general obligation, tax-supported bond election, it is the part of reason and practicality that the voters currently eligible decide the special issues in question.

[5]As a matter of historic fact, the City of Fort Worth has never issued any ad valorem tax-supported bonds with a maturity in excess of twenty-five years.

We must assume that such rendering property owners will competently express the desires of renderers and that their decisions will not be completely at odds with future generations of property renderers. Further, any person who becomes a renderer after a general obligation, tax-supported bond election so becomes a renderer with full knowledge of the lien which has been or will be placed on his or her property and is not, therefore, undertaking any financial responsibility for which he or she does not choose to become liable.

In determining whether the constitutional provisions in question are violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, it is enlightening to reflect upon this Court's finding in *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 10, 21 L.Ed.2d 24 (1968):

> " * * * this court has firmly established the principle that the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution."

The State aim and compelling necessity of using every available means to enable it to enforce the law requiring voluntary rendition is validated in *Montgomery*, supra, at page 641:

> " * * * There may be other means to reach personal property, but experience has shown that every means must be pressed into service if the obligations of government are to be spread equally."

Despite the fact that some non-renderers within the community may have property taxes passed on to them

in the market prices they pay, it is also indelibly certain that the increase in taxes will have its most direct and penetrating effect on the renderers. The burden of increased taxes in the form of higher market prices will also be passed on to the purchasers of goods and services produced within the community who live beyond the corporate limits. However, not even plaintiff-appellees can logically claim that these distant buyers have an interest in the election although they may be responsible for payment in the same way as non-renderers in the community. Rather, it is a well recognized fact that limits must be placed somewhere, and it is only logical and reasonable that those who render their property for taxation and thereby assume their proper burden of responsible citizenship, should be within the limitations, while those who do not choose to take such responsibility should be outside the limitations and not allowed to vote.

The classification in the case at bar is the means to a permissible legislative end. A rational person can easily see the relationship between such classification and its legislative ends — the requirement that one must render property for taxation in order to vote in a general obligation, tax-supported bond election is a compelling inducement for rendition of property and tends to enhance voter competence. The constitutional, statutory and charter provisions which call for the rendition of either personal, real or mixed property for taxation in order to become a qualified voter in general obligation, tax-supported bond elections are rationally related to a permissible legislative end and serve several purposes:

1. They serve as an appropriate means to the legislative end of collecting property taxes.
2. They insure that those who will bear the direct burden of paying for the bonds supported by a lien placed on their property will have a strong voice (undiluted by those hoping for benefits without cost) in deciding exactly how great a burden they are willing to assume.
3. They create an electorate composed of more informed and knowledgeable voters. This is not to say that property renderers are inherently more intelligent than non-renderers; rather they are more likely to make themselves aware of the issues and to cast a more knowledgeable ballot because they obviously have an infinitely greater personal stake in the outcome of the bond election.
4. They tend to keep indebtedness within controllable limits.
5. They tend to keep ad valorem property taxation within controllable limits.

It is important to realize that in all elections, necessary restrictions are placed on the franchise. The restrictions limiting the vote to those eighteen years of age and older, to residents in the voting district, and to those who have not been otherwise disenfranchised undoubtedly deny the vote to one or more individual citizens who may be informed on the issues and may have a great interest in them. This Court, in *Kramer v. Union Free School District*, 395 U.S. 621, 89 S.Ct. 1886, 1895, 23 L.Ed.2d 583 (1969), a case involving the franchise to vote for the members of a school board, said:

> " *** Just as '[i]lliterate people may be intelligent voters,' nonresidents or minors might also in some instances be interested, informed, and intelligent participants in the electoral process. Persons who commute across a state line to work may well have a great stake in the affairs of the State in which they are employed; some college students under 21 may be both better informed and more passionately interested in political affairs than many adults. But such discrepancies are the inevitable concomitant of the line drawing that is essential to law making. So long as the classification is rationally related to a permissible legislative end, therefore — as are residence, literacy, and age requirements imposed with respect to voting — there is no denial of equal protection."

It would be impossible to accurately distinguish those non-renderers who are informed and genuinely interested in the outcome of the bond election from those who are only hoping for hand-outs from the property-rendering ad valorem taxpayers.

The Three-Judge Court has erroneously compared the unconstitutional poll tax to the State's rendering requirement. The poll tax is readily distinguishable from the rendering requirement: (1) The rendering requirement makes rendering any kind of property a prerequisite to voting; it does not require the payment of the tax. (2) The rendering requirement is a prerequisite to voting only in special general obligation, tax-supported bond elections, not all elections. (3) The rendering requirement has no relationship to an exercise of the general powers of government but only concerns itself with a special type of election. Willingness

to pay the poll tax has nothing to do with voter qualifications; willingness to render property for taxation shows a willingness to back financially the bonds the voters approve. The poll tax requirement had no relevance to voter capability; whereas, the rendering requirement, as has been conclusively demonstrated in the argument herein, distinguishes those voters who not only are more knowledgeable of the propositions being decided because of the responsibility they will incur through their votes, but who also are willing to comply with the responsibilities of citizenship by voluntarily rendering their property for taxation, as opposed to those voters who shirk such obligations.

The facts in the case at bar differ markedly from those in *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 90 S.Ct. 1990, 1994, 26 L.Ed.2d 523 (1970). There it was stipulated:

> " *** that more than half of the debt service requirements will be satisfied not from real property taxes but from revenues from other local taxes paid by nonproperty owners as well as those who own real property."

In the case at bar, the uncontroverted, stipulated testimony of the Treasurer, Mr. Bateman, shows that the debt service on all outstanding tax-supported bonds is and will be paid solely from tax proceeds. (Appendix, pp. 79-84)

The returns of the election show that the owners of property rendered for taxation were perfectly willing to support the acquisition of the bus system by a sub-

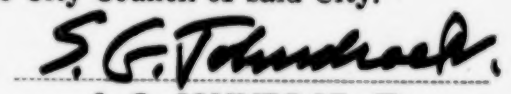
stantial majority but saw no public necessity to issue general obligation, special purpose bonds and increase taxation for another central library.

CONCLUSION

In conclusion, we sincerely believe that it has been shown herein that the rendering requirements set forth in the Constitution and statutes of the State and in the Charter of the City of Fort Worth are logical, suitable and reasonable for voters in a general obligation, tax-supported, special purpose bond election. They do not restrict the franchise to the "wealthy"—the constraints they place on voting can be met by any otherwise qualified voter willing to assume his or her responsibilities of citizenship. The rendering requirement in a general obligation, special purpose, tax-supported bond election is as reasonable a limitation on the franchise as are residence and age requirements in all elections. Such distinguishes a group of voters who are more knowledgeable about and have a greater interest in the outcome of the bond election than those who have no financial stake therein. Furthermore, it is an appropriate, fair and reasonable means to the legislative end of controlling debt and taxation, as well as collecting the easily hidden ad valorem property taxes which support the municipalities of Texas. The cries of plaintiff-appellees herein that they are being denied equal protection have no basis in law or in fact.

We respectfully submit that the decision of the Three-Judge Court should be reversed and rendered on behalf of appellant and the City of Fort Worth; R.

M. Stovall, its Mayor; S. G. Johndroe, Jr., its City Attorney; Roy A. Bateman, its City Secretary; and the Members of the City Council of said City.



S. G. JOHNDROE, JR.

Attorney for the Appellees,
THE CITY OF FORT WORTH,
TEXAS, a municipal corporation;
R. M. STOVALL, its Mayor; S. G.
JOHNDROE, JR., its City Attorney;
ROY A. BATEMAN, its City
Secretary; and the MEMBERS OF
THE CITY COUNCIL thereof

1000 Throckmorton Street
Fort Worth, Texas 76102

CERTIFICATE OF SERVICE

I, S. G. Johndroe, Jr., City Attorney of the City of Fort Worth, Texas, attorney for appellees, the City of Fort Worth, Texas, a municipal corporation; R. M. Stovall, its Mayor; S. G. Johndroe, Jr., its City Attorney; Roy A. Bateman, its City Secretary; and the Members of the City Council of said City, in the above entitled and numbered cause, hereby certify that on the 24 day of Dec., 1974, I served true and correct copies of this Brief of Appellees by placing the same in the United States Mail, postage prepaid, correctly addressed to

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Assistant Attorney General of Texas
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and

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[redacted]

NO. 73-1723

Supreme Court, U. S.
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JUN 14 1974
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

JOHN L. HILL, ATTORNEY GENERAL
OF THE STATE OF TEXAS
Appellant

v.

MICHAEL L. STONE, ET AL
Appellees

Appeal From the United States District Court For the Northern District of Texas, Fort Worth Division

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE CITY OF CORPUS CHRISTI TOGETHER WITH BRIEF AMICUS CURIAE

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-1723

JOHN L. HILL
ATTORNEY GENERAL OF THE STATE OF TEXAS

v.

MICHAEL L. STONE, ET AL

MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE ON BEHALF OF THE
CITY OF CORPUS CHRISTI
TOGETHER WITH BRIEF AMICUS CURIAE

The City of Corpus Christi, Texas, respectfully moves for leave to file a Brief Amicus Curiae. The City of Corpus Christi makes this request under Supreme Court Rule 42,4. as a political subdivision of the State of Texas.

The Movant, City of Corpus Christi, is a municipal corporation duly incorporated and existing under the laws of the State of Texas, operating under a home rule Charter in Nueces County, Texas.

The Movant is directly interested because there is an identical question of law and fact in common with a case filed against the City of Corpus Christi before The United States District Court, Southern District of Texas, Corpus Christi Division, styled William O. Harrison, Jr., et al v. The City of Corpus Christi, Texas, et al, Cause No. 74-C-60.

Movant would show this Honorable Court that the same questions of law exist as to whether its residents who fail to render their property for City taxation possess a right to have their votes in bond elections counted equally with votes of rendering, resident property owners. Further,

that the legality of Article 6, Section 3, and Section 3A, of the Texas Constitution, Articles 5.03, 5.04, and 5.07 of the Texas Election Code are in question and a portion of Article VII, Section 10 of the Charter of the City of Corpus Christi, Texas, is in question, all of which provisions purport to restrict the right to effectively vote in bond elections to persons who own property which has been rendered for taxation.

Movant would further show this Honorable Court that Movant attempted to intervene in the case presently under consideration by this Court but such intervention was not allowed by the three-Judge Trial Court because, among other unstated reasons, it was not timely filed. In addition to denying the Movant's Motion to Intervene the said Trial Court made its judgment prospective in nature, except as to a City of Fort Worth bond issue only, thus disallowing the Movant the opportunity

to make the judgment applicable to itself.

Movant held an election on the 9th day of December, 1972, on a City Convention Center bond proposition which reflects the following results of that election:

Property owners - Votes for	7,705
Property owners - Votes against . .	7,810
Nonproperty owners - Votes for . .	1,601
Nonproperty owners - Votes against	820
Total for	9,306
Total against . .	8,630

The Movant, City of Corpus Christi, would show that the City Council of the City of Corpus Christi would, but for the complaint of Texas Constitutional and Statutory provisions, which are contested in the Michael L. Stone case, attempt to issue and sell bonds approved by the voters of the City of Corpus Christi on the 9th day of December, 1972, in said proposition.

It is thus apparent that the resolution of the issue involved in this case,

which concerns the validity of the complained of Texas Constitutional and Statutory provisions, is of vital interest to the City of Corpus Christi. The case of John L. Hill v. Michael L. Stone, et al, pending in this Court on direct appeal from a three-Judge Court decided that the complained of Texas Constitutional and Statutory provisions were unconstitutional violations of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

Hence, we seek leave to place before the Court a statement of our reasons for believing that this Honorable Court should be cognizant of the William O. Harrison, Jr. v. The City of Corpus Christi case as it relates to the case presently before this Court on the direct appeal of John L. Hill v. Michael L. Stone, et al. A

Brief containing such presentation is tendered with this Motion.

For each and all of the foregoing reasons, the Movant's Motion should be granted.

Respectfully submitted,

JAMES R. RIGGS
City Attorney

JAMES F. McKIBBEN, JR.
Assistant City Attorney

James F. McKibben, Jr.

ATTORNEYS FOR THE
CITY OF CORPUS CHRISTI

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-1723

JOHN L. HILL
ATTORNEY GENERAL OF THE STATE OF TEXAS

v.

MICHAEL L. STONE, ET AL

BRIEF OF AMICUS CURIAE
THE CITY OF CORPUS CHRISTI

QUESTIONS PRESENTED

This case presents questions regarding the constitutionality of State and City laws which may restrict suffrage and bond elections to persons who have made available for taxation some item of real, personal, or mixed property. The questions

presented necessarily include the following:

1. Whether the requirement of rendering property by the electorate is necessary to promote the State's articulated interest.

2. Whether the interest is compelling.

INTEREST OF AMICUS CURIAE

The City of Corpus Christi is in a situation comparable to the City of Fort Worth. Indeed, if any difference exists between the two cases, the difference is that the City of Corpus Christi would, but for the Texas Constitutional provisions and Statutory law, seek to have the Attorney General approve and certify the bonds for sale.

The City of Corpus Christi has pending in the Southern District of Texas a case involving the same questions of fact and law as is before the Court in this case. The City of Corpus Christi filed a Motion

To Intervene in the Michael L. Stone case while it was before the three-Judge Federal Court sitting at Fort Worth. The Motion to Intervene was denied because, among other unstated reasons, the Court stated it was not timely filed. Subsequent to the Motion to Intervene being denied, a suit was filed requesting the convention of a three-Judge Federal Court in the Southern District of Texas to decide substantially the same issues as were decided in the Michael L. Stone case. The opinion of the Michael L. Stone case was prospective in nature as to all entities other than the City of Fort Worth, thus the ruling would not be applicable to the situation of the City of Corpus Christi. In the Michael L. Stone case a majority of rendering property owners rejected the proposal to issue library bonds, but the nonrenderers approved it by a three-to one margin. Adding together the votes of both groups showed that a majority of all

the voters participating favored issuing the library bonds. The net result was that library bonds could be sold only if the nonrenderers were constitutionally entitled to vote despite the contrary Texas and Fort Worth laws. The City of Corpus Christi case has substantially the same fact situation in that a majority of the rendering property owners rejected the proposal to issue bonds for a Convention Center, but the nonrenderers approved it by a two-to-one margin. Adding together the votes of both groups showed that a majority of all the voters participating favored issuing the Convention Center bonds. The bond election held on the 9th day of December, 1972, reflected the following results of the election, as to the Convention Center proposition:

Rendering property owners -
Votes for 7,705

Rendering property owners -
Votes against . . . 7,810

Nonrendering voters -
Votes for 1,601

Nonrendering voters -
Votes against . . . 820

Total for 9,306

Total Against . . . 8,630

The net result is that the Convention Center Bonds can be sold only if the non-rendering voters were constitutionally entitled to vote and have their vote counted equally with rendering property owners despite Texas and Corpus Christi law to the contrary. The question before the Fort Worth three-Judge Federal Court in the Michael L. Stone case is the same question which is before the Corpus Christi Court, to-wit: whether the provisions in question are consistent with the principles of equal protection.

ARGUMENT

The questions to be resolved by this Court turn on whether the State interest is compelling in nature. An interest to be considered is limiting the ballot to those who have a financial stake in the election's outcome. This interest is based on notions of fairness: Those whose taxes will service the bonds should be the only ones deciding whether the debt is worth undertaking. To permit nonrenderers a "free ride" would be tantamount to depriving the renderers of their property without due process, and would at least constitute preferential treatment.

The other interest advanced is the necessity of encouraging the citizens to render their property so that the public treasury will be fortified by an efficiently collected property tax. See Montgomery Independent School District v.

Martin, 464 S.W.2d 638 (Tex. 1971); Markowsky v. Newman, 136 S.W.2d 808 (Tex. 1940).

The case of City of Phoenix v. Kolodziejski, 1970, 399 U.S. 204, 90 Sup. Ct. 1990, and the ruling therein is distinguishable from the Texas situation in that more than half of the debt service requirements were to be satisfied from taxes paid by nonproperty owners in the Arizona case and by contrast, under the Texas law, bonds would be serviced entirely by property taxes. The City of Corpus Christi is concerned with the issues presented and the outcome of this case because its result should be decisive of the questions presented in the City of Corpus Christi case, however, since the Michael L. Stone order was prospective in nature and since the bond election of the City of Corpus Christi was held prior

to that opinion being rendered, but after the Fort Worth bond election, the City of Corpus Christi would be put to the undue hardship and burden of continuing its case through the Southern District of Texas, thence to this Honorable Court, in order to receive like treatment of that of the City of Fort Worth. If this case were merely affirmed on appeal without a written opinion making allowances for the City of Corpus Christi to be included in the judgment of this Honorable Court, the City of Corpus Christi would be done grave injury. In the alternative, this hardship could be relieved by allowing a consolidation of the Fort Worth case and the City of Corpus Christi case so that they may be rendered together.

CONCLUSION

The three-Judge Federal Court, convened in the Fort Worth Division of the

Northern Division of Texas, could within their discretion have allowed the intervention of the City of Corpus Christi, thus preventing extensive and expensive litigation, but failed to do so. The Fort Worth Court could also have made its judgment include the period subsequent to the bond election held in Fort Worth which would have included the Corpus Christi situation, but they failed to do so. If this Court should decide to make its own full determination on the merits of the issues raised, it is prayed by the City of Corpus Christi that this Court's order would extend to the Corpus Christi situation or, in the alternative, that this Court would allow a consolidation between the Fort Worth and the Corpus Christi cases. Unless this Court makes such determination on the merits of the issues raised by the appeal, the case should be

remanded to the Fort Worth three-Judge Federal Court with instructions to that Court to give a full and prompt review of the position of the City of Corpus Christi.

Respectfully submitted,

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JAMES F. McKIBBEN, JR.
Assistant City Attorney

James F. McKibben, Jr.

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CERTIFICATE OF SERVICE

A copy of the above and foregoing Motion for Leave to File Brief Amicus Curiae on Behalf of the City of Corpus Christi Together With Brief Amicus Curiae has been furnished to counsel for Appellees by depositing same in the United States Mail, postage prepaid, addressed to Marvin Collins, 702 Burk Burnett Building, Fort Worth, Texas 76102; to S. G. Johndroe, 1000 Throckmorton Street, Fort

Worth, Texas 76102, attorney for the City of Fort Worth; and Larry F. York, Executive Assistant Attorney General, Box 12548, Capitol Station, Austin, Texas, 78711, attorney for John L. Hill, this 13TH day of June, 1974.

James F. McKibben, Jr.

JAMES F. McKIBBEN, JR.
Assistant City Attorney

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1723

JOHN L. HILL, Attorney General of Texas,

Appellant,

v.

MICHAEL L. STONE, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF FOR AMICUS CURIAE

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IN THE

Supreme Court of the United States

No. 73-1723

JOHN L. HILL, Attorney General of Texas,

Appellant,

v.

MICHAEL L. STONE, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF OF WILLIAM O. HARRISON, JR., ADAM BASALDUA, JR., MRS. JIMMIE H. KING, AND RICHARD BONNER AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

William O. Harrison, Jr., Adam Basaldua, Jr., Mrs. Jimmie H. King and Richard Bonner are Plaintiffs in a cause numbered 74-C-60 styled William O. Harrison, Jr., et al. v. The City of Corpus Christi, et al. presently pending before the United States District Court for the Southern District of Texas, Corpus Christi Division. Such cause is, in all respects, similar to the case at bar. In the case at bar the Fort Worth election was held on April 11, 1972 submitting to the public a bond issue for library bonds. Such bonds were not approved by a majority of owners

such citizen has a historically recognizable interest, it may only be for reasons of compelling State interest. *Kramer* v. *Union Free School District*, supra; *Phoenix* v. *Kolodziejski*, supra. Or, recognizing the test advocated by some of the justices of this Court, by reason of a purpose rationally related to a permissible legislative end. See dissenting opinion of Justice Stewart joined in by Justices Black and Harlan in *Kramer* v. *Union Free School District*, supra.

In each case in which there is some restriction upon or denial of the voting franchise upon grounds other than those rationally protecting the intelligent exercise of such franchise the first question becomes whether such denial of or limitation upon the right to vote affects a citizen or citizens having a historically recognizable substantial interest therein. *Kramer* v. *Union Free School District*, supra; *Phoenix* v. *Kolodziejski*, supra; *Salyer Land Company* v. *Tulare Lake Basin Storage District*, supra. Because of our historical tradition, at least since the time of the Fourteenth Amendment, of unrestricted franchise upon a one person to one vote basis it would seem that the burden would be upon those claiming that the state laws relating to voting did not result in invidious discrimination against a particular citizen or group of citizens to show that such citizen or group of citizens did not have a historically recognizable interest in the particular democratic decision making process in question.

Salyer Land Company v. *Tulare Lake Basin Water Storage District*, supra, seems to be a case in which such a burden was met. In *Tulare*, a special type of water district in which, at least by majority view, both the burdens (taxation) and the benefits (water use) were shared only by the owners of land in the district and then proportionately, and in which voting was limited to such owners, and then proportionately to tax base, was not invidious discrimination as it did not relegate to a minority status in the particular democratic decision making process any citizen or group of citizens having a historically recognized substantial interest therein. Put another way, in that case the parties complaining of being denied a right to vote in the water storage district elections had no recognizable interest therein as they neither shared in the burdens nor the benefits resulting therefrom. A similar analysis would apply to *Associated Enterprises, Inc.* v. *Toltec Watershed Improvement District*, 410 U.S. 743, 35 L.Ed.2d 675, 93 S.Ct. 1237 (1973).

The interest of one group of citizens to the exclusion of another and the fair distribution of votes based on benefits and burdens is not so easily recognized in other situations; and in most situations, other than special purpose districts as existed in *Tulare* and *Toltec*, the historical tradition of equality, proven in practice as superior to any other system in protecting the democratic process, is one person-one vote. *Reynolds* v. *Sims*, supra.

The case at bar most nearly resembles the case before the court in *Phoenix*. The major differences are that in the case at bar: (1) questionability of the Texas laws had been recognized by the Attorney General and a dual system of voting installed in recognition thereof; (2) the complaining citizens object to the defeat of the bond election whereas in *Phoenix* the complaint was with regard to passage of the bond issues; (3) the Texas law restricts voting in bond issues to rendering owners of any property not specifically exempted by statute whereas in *Phoenix* voting was restricted to real property owners; and (4) the principal and interest on the bonds would be repaid solely from revenues from property taxes whereas in *Phoenix* property taxes were to be levied to service such indebtedness but

the city was legally privileged to use other revenues in payment of the bonds.

There are other peculiarities in Texas law which are relevant to the issue of discrimination. There is a possibility not only of self-discrimination by reason of the citizen failing to render his property (whether the result of ignorance, negligence, or a reluctance to pay taxes, particularly on personalty) but of discrimination by the tax-assessor and collector in the exercise and non-exercise of such official's power to search out and place upon the tax rolls any properties subject to taxation. See *Montgomery Independent School District* v. *Martin*, 464 S.W.2d 638 (Tex. 1971).

The Attorney General argues that "[t]he very nature of a general obligation bond and the universality of property subject to taxation in Texas combine to lend constitutional validity to the property rendering requirements. . . ." and that the Texas laws while disenfranchising no one "limits the vote to those who are 'primarily interested' in the outcome of . . ." a bond election. The components of the argument are contradictory.

The mere fact that the citizen makes the choice will not rescue from such laws being classified as invidious discrimination. *Harper* v. *Virginia State Board of Elections*, supra. But, even so, in the case of the Texas laws the very purpose can be defeated at least in part if not in whole by the action of the tax-assessor and collector, if, indeed, the purpose could be considered worthwhile when the rendition of one single property of smallest value would suffice.

The State argues that the Texas laws limit the vote to those who are "primarily interested" in the outcome of an election and by reason thereof does not fail to afford the

equal protection of the laws. Primary interest does not rest exclusively in those bearing the burden of ad valorem taxation, if it can truly be said that the burdens would only be imposed upon the rendering taxpayers. (The fact that principal and interest of the bonds may only be paid from such revenues means that other citizens will bear a burden by increase in sales taxes, utility revenues, and the like, to support other city services otherwise paid by such ad valorem taxes as well as increased rents and other cost of goods and services by reason thereof.) Users of the facilities to be built as a result of the bond issue, that is, beneficiaries thereof, have as much "primary interest," that is, recognizable substantial interest, in such an election.

That all citizens, be they property owners or non-property owners, have a substantial interest in public libraries has been recognized by a prior opinion of this Court. *Avery* v. *Midland County*, supra, at page 53. Likewise, it would seem all citizens have such an interest in convention centers and similar public facilities.

Restriction upon or denial of voting rights to any part of that public must therefore rest upon some other recognizable state interest whether it be tested by the "compelling state interest" test or by determination of a purpose rationally related to a permissible legislative (or state constitutionally authorized) end.

The State has urged as such interest or purpose forcing the non-renderer of property to render such property for taxation. But such purpose is at best a myth since any citizen may make a mere token rendition and secure voting privileges.

Further, the Texas laws in question are not rationally related to accomplishment of such purpose not only by

reason of token rendition being sufficient but also because the act of the tax-assessor and collector may relieve the non-renderer from any affirmative act.

Tested by all standards the Texas laws limiting bond issue elections to owners of property rendering property for taxation relegates to a minority status in the democratic decision making process a group of citizens having a historically recognizable substantial interest in such elections without justification by reason of compelling state interest or, alternatively, by reason of a purpose rationally related to a permissible legislative (or state constitutionally authorized) end.

Comparison with *Phoenix* demonstrates no distinction of such merit as to justify not following the rule of stare decisis.

B. The Decision of the District Court Should Apply to all Texas Cases Arising After the City of Fort Worth Election in Which the Dual-Box Election Procedure was Followed.

The District Court in its opinion noted that "many communities have relied on the Texas law and have approved or disapproved bonds in elections that *excluded the votes of citizens not rendering property for taxation.*" (emphasis supplied) The District Court ordered prospective relief only.

As this Court observed in *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), ancient dogma suggests that all court decisions are to have a retroactive effect. Such question is not one of constitutional dimension. *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, supra. In stewarding the Federal law and the U.S. Constitution, the Federal courts have reserved unto themselves the discretionary lattitude to avoid giving full retroactive effect to judgments where the goal is "avoiding the 'injustice or hardship' by a holding of non-retroactivity." *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969).

Bond elections held in the Texas cities of Fort Worth and Corpus Christi were held after this Court's rulings in *Cipriano* and *Phoenix*. Both cities recognized that the Texas law was subject to the same attacks made in Arizona and Louisiana. Accordingly, both cities held elections which could be effected under both extant Texas law and the law as may soon be announced by this Court. Given a retroactive application of the Fort Worth decision, neither city will have suffered for reliance upon the Texas statute. Neither will any other Texas municipality which has held a dual-box election as in the case of Fort Worth and Corpus Christi if such retroactive effect is limited to such elections as it should be. To the contrary, Fort Worth and Corpus Christi have held elections in reliance upon their belief that should their dilemma become real, such dilemma would be resolved by the Courts. Each city has sought to avoid the uncertainty occasioned by holding a potentially void election and each has sought to obviate the expense of monies and time which a second election would necessitate. Making the decision in this case retroactive as to all dual-box elections could spare the State and its municipal subdivision as well as the Courts multiplicity of suits.

One other limitation to avoid the possibility of undue hardship upon such retroactive effect should be that the decision would be prospective only as to any election in which property owners rendering property for taxation approved the issue and the total vote disapproved the issue in the unlikely event that the Attorney General may have approved issuance of bonds in such a case and which bonds may have been sold or be in the process of being sold. Otherwise, no harm can result from sale of bonds or from prohibiting the sale thereof as the result of any dual-box election, and substantial waste of time, money and courts'

time can result from a judgment applying only to elections occurring subsequent to its announcement.

CONCLUSION

For the reasons stated the decision of the three-judge district court that the Texas laws in question violate the U. S. Constitution's equal protection clause should be affirmed; however, the judgment of that court should be modified to make it applicable to other Texas cases such as the Corpus Christi case in which the dual-box election procedure was followed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marshall Boykin III, as of counsel for Amicus Curiae herein named and member of the Bar of the Supreme Court, hereby certify that true and correct copies of the above foregoing Amicus Curiae Brief have been served upon the several parties thereto, in compliance with Rule 33(1) of the United States Supreme Court Rules, by placing three copies in the mail, first class postage prepaid, to S. G. Johndroe, Jr., City Attorney and Attorney for Appellees R. M. Stovall, S. G. Johndroe, Jr., Roy A. Bateman, Leonard E. Briscoe, Taylor Gandy, Jess M. Johnston, Jr., W. S.

Kemble, Jr., John O'Neill, Ted C. Peters, Pat Reece, Mrs. Margaret Rimmer, and the City of Fort Worth, at 1000 Throckmorton Street, Fort Worth, Texas 76102; and by placing three copies in the mail, first class postage prepaid, to Don Gladden and Marvin Collins, Attorneys for Appellees, at 702 Burk Burnett Building, Fort Worth, Texas 76102; and by placing three copies in the mail, first class postage prepaid, to John L. Hill, Attorney General of Texas, Larry F. York, First Assistant Attorney General, Mike Willatt, Assistant Attorney General, and G. Charles Kobdish, Assistant Attorney General, Attorneys for Appellant, State of Texas, at Box 12548, Capitol Station, Austin, Texas 78711. I further certify that I also placed three copies in the mail, first class postage prepaid to James R. Riggs, City Attorney of Corpus Christi, Texas, and James F. McKibben, Jr., Assistant City Attorney of Corpus Christi, Texas at P. O. Box 9277, Corpus Christi, Texas 78408. All parties required to be served have been served.

Witness my hand this 20 day of December, 1974.

Marshall Boykin III

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OCTOBER TERM, 1974

No. 73-1723

JOHN L. HILL, Attorney General of Texas,
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Appellees.

BRIEF AMICUS CURIAE ON BEHALF OF EL PASO COUNTY JUNIOR COLLEGE DISTRICT, URGING AFFIRMANCE

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BRIEF AMICUS CURIAE ON BEHALF OF EL PASO COUNTY JUNIOR COLLEGE DISTRICT, URGING AFFIRMANCE

The respective counsel for the Attorney General of Texas, the Mayor and City Council of the City of Fort Worth, and Michael L. Stone have filed with the Clerk written consents to the filing of this Brief *Amicus Curiae*, pursuant to Rule 42(2) of the Supreme Court Rules. Written consent has been obtained from all parties to the case.

QUESTION PRESENTED

Are the Texas constitutional and statutory provisions restricting the franchise in general obligation bond elections to persons who have rendered property for taxation violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States?

INTEREST OF AMICUS CURIAE

The El Paso County Junior College District (hereinafter referred to as the "College District") is a political subdivision of the State of Texas organized and maintained under the provisions of the Texas Education Code.[1] Its purpose is to provide "(1) technical programs up to two years in length leading to associate degrees or certificates; (2) vocational programs leading directly to employment in semi-skilled or skilled occupations; (3) freshmen and sophomore courses in arts and sciences; (4) continuing adult education programs for occupational or cultural upgrading;

1. TEX. EDUC. CODE ANN. §130.001 (1972) *et seq.* The formation of a county junior college is initiated by ten percent of the qualified taxpaying electors of the proposed district petitioning the county school board or, if there is no county school board, the county commissioners' court. TEX. EDUC. CODE ANN. §130.033(c) (1972). The board or court examines the petition, and if it is legally sufficient, it is forwarded to the Coordinating Board, Texas College and University System. TEX. EDUC. CODE ANN. §130.035 (1972). The coordinating board, with the advice of the commissioners of higher education, determines if the requisite statutory conditions have been met, and if "it is feasible and desirable to establish a junior college district." TEX. EDUC. CODE ANN. §130.036 (1972). The coordinating board is obligated to consider "the welfare of the state as a whole, as well as the welfare of the community involved." *Id.* The interests of the taxpayers or renderers, therefore, are not the only interests considered, even though the amount of taxable property valuation of a proposed district must be at a certain level in order to create a junior college district. TEX. EDUC. CODE ANN. §130.032 (1972).

The decision of the coordinating board is issued to the county school board or the county commissioners' court, and, if favorable, the appropriate county body orders an election. TEX. EDUC. CODE ANN. §130.037 (1972). A majority of all voters "shall determine the question of the creation of the junior college district . . . and the election of the original trustees." TEX. EDUC. CODE ANN. §130.038 (1972). If the election also determines propositions for the issuance of bonds or the levying of taxes, only those electors who satisfy the requirements of Article VII, §3 and Article VI, §3a of the Texas Constitution may vote on the propositions. TEX. ATT'Y GEN. OP. No. M-1139 (1972). See also Shepard v. San Jacinto Junior College Dist., 363 S.W. 2d 742 (Tex. 1963). All electors may vote on the creation of the district, but if the district is to issue bonds or levy taxes the electorate is restricted.

(5) compensatory education programs designed to fulfill the commitment of an admissions policy allowing the enrollment of disadvantaged students; (6) a continuing program of counseling and guidance designed to assist students in achieving their individual educational goals; and (7) such other purposes as may be prescribed by the Coordinating Board, Texas College and University System, or local governing boards, in the best interest of post-secondary education in Texas."[2]

The College District receives money appropriated from the state treasury[3] and from the collection of tuition and fees.[4] All funds so received must be used solely "for the purpose of paying salaries of the instructional and administrative forces [of the College District] and the purchase of supplies and materials for instructional purposes."[5] If a junior college district is to have classroom buildings and other structures it must issue general obligation bonds supported by a tax levied for their payment.[6] On September 21, 1974, in order to construct campus buildings, the College District conducted an election to determine (1) if a Junior College Maintenance Tax should be implemented, and (2) if general obligation bonds should be authorized together with a tax to support their payment.

The conduct and outcome of the El Paso election was similar to the April 11, 1972, Fort Worth election. The propositions in both elections were submitted to the electorate by a system of dual balloting. Qualified electors who had rendered property for taxation voted separately

2. TEX. EDUC. CODE ANN. §130.003(e) (Supp. 1974).
3. TEX. EDUC. CODE ANN. §130.003(a) (Supp. 1974).
4. TEX. EDUC. CODE ANN. §130.003(b)(4) (Supp. 1974).
5. TEX. EDUC. CODE ANN. §130.003(c) (Supp. 1974).
6. TEX. EDUC. CODE ANN. §130.122 (1972).

from qualified electors who had not rendered property for taxation. As in the case of the Fort Worth library bonds, a majority of all El Paso voters approved the bond issue and tax, but a majority of those who had rendered property for taxation disapproved the issuance and tax.[7]

Under the authority of Articles VI, §3a and VII, §3 of the Texas Constitution,[8] and Articles 5.03 and 5.04 of the Texas Election Code,[9] the ballots cast by the non-renderers are invalid. The non-renderers' votes were canvassed only to assure "that bonds issued were compatible with both the Texas Constitution and the United States Constitution."[10] It has been the policy of the Texas Attorney General, who is required to approve bonds issued by junior college districts,[11] not to grant such approval unless a majority of

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7. The election results were as follows:

	Owners of Property Rendered for Taxation	Non Renderers	Total
Proposition One			
Junior College District Maintenance Tax			
For	9,614	2,026	11,640
Against	9,734	370	10,104
Proposition Two			
The Issuance of Junior College District Bonds and Levying the Tax in Payment Thereof			
For	9,547	2,016	11,563
Against	9,791	378	10,169

8. TEX. CONST. arts. VI, §3a; VII, §3. See page A1, *infra*.

9. TEX. ELECTION CODE ANN. arts. 5.03; 5.04(a) (Supp. 1970). See pages A2 and A3, *infra*.

10. Brief of Appellant at 3.

11. TEX. EDUC. CODE ANN. §130.122 (d) (1972).

both renderers and non-renderers have voted in favor of the bond issue. Although the majority of citizens voting in the election favored the issuance of the bonds, no issue has taken place because of Texas' constitutional and statutory prohibitions.

Certain non-rendering electors residing in the College District have challenged the Texas rendering scheme in the United States District Court for the Western District of Texas in a suit styled *David E. Hilles, et al.* v. *John L. Hill, Attorney General of Texas, et al.*, No. EP-74-CA-215. The College District is a party defendant to said suit, and has answered that the laws of Texas prohibit the issuance and sale of the bonds.

The laws which have discriminated against a large segment of the El Paso population, also have stymied the ability of the College District to provide adequate facilities for its students. The College District has an interest in the outcome of case at hand, and would urge that the Texas constitutional and statutory provisions restricting the franchise in bond elections be held as violative of the Equal Protection Clause of the Fourteenth Amendment. The situation presented by the City of Fort Worth and that of the College District are dissimilar in only one way: the breadth of the powers of the city exceed those of the college. The College District, therefore, maintains an additional interest in expressing the views of a governmental unit possessing powers less than those of a city. The *amicus curiae* would assert that its powers and functions are sufficiently broad to be considered as normal governmental activities having a substantial impact upon the entire community. The College District is especially interested in any definition that the Court might frame setting out the relation between voting rights and local governmental powers.

SUMMARY OF ARGUMENT

The State of Texas, through constitutional and statutory provisions prohibits a definable class of citizens from voting in general obligation bond elections. Unless a resident renders his property, or a portion thereof, for taxation, he cannot vote in such a bond election. By restricting the franchise in this manner, the state has infringed on a constitutionally protected right. The laws authorizing this infringement must be strictly reviewed to determine if they are necessary to promote a compelling state interest.

The well-established doctrine of "one person, one vote" extends to political subdivisions of the state which exercise general governmental powers and affect the interests of its constituents. Intangible as well as concrete financial interests are affected by the outcome of bond elections, and both interests must be weighed in determining Equal Protection claims. An interest in educational quality or civic improvement need not be exclusively tied to economic considerations in order to be entitled to constitutional protection. Recognition also has been granted to indirect economic interests. The citizen whose rental payments and consumer costs will be affected by a bond election is entitled to cast a ballot. Texas has unconstitutionally restrained members of the disenfranchised class from protecting these justiciable interests at the polls.

The right to vote, however, does not extend to extremes of the governmental spectrum. This narrow exception to the "one person, one vote" rule applies to specialized units of government which have a disproportionate effect on a particular group. Both a "special function" and a "disproportionate effect" are required to invoke the exception. A special-function governmental unit having a

substantially equal effect on all constituent groups would be required to have an unrestricted franchise.

The City of Fort Worth is not a specialized unit of government and the issuance of bonds is not a special function of government. The citizenry as a whole has a stake in, and will be affected by, a general obligation bond election, but the state recognizes only direct economic interests. A large class of citizens has been excluded from bond elections even though they have a recognized interest in the outcome.

The restrictive franchise is not necessary to promote any compelling state interest. The statutory scheme is vaguely directed toward the collection of taxes. By conditioning the franchise on rendition, the state reasons, property holders will be encouraged to render their property for taxation. Not only is this goal ill-served by the rendition requirement, but it is totally unrelated to the establishment of legitimate voter qualifications. Any amount of property may be rendered to satisfy the voting requirement; rendition of near valueless property will entitle the owner to vote. It cannot be urged seriously that the renderer has become a better voter or that his stake in the election outcome has increased. Nonetheless, he is allowed to vote, while other citizens who will be substantially affected by the election cannot.

The rendition requirement is discriminately administered. The local tax assessor seeks out certain types of property, thereby enfranchising the owners either when the property is voluntarily rendered or when the assessor places it on the tax rolls. Owners of property unsought by the assessor must render items which the assessor requires no other citizen to render. An unequal burden is placed on this class of citizens.

ARGUMENT

I. The Texas Constitutional and Statutory Provisions Restricting the Franchise in General Obligation Bond Elections to Citizens Who Have Rendered Property for Taxation Must Be Strictly Scrutinized to Determine If the Provisions Are Necessary to Promote a Compelling State Interest.

A. An Infringement on a Constitutionally Protected Right Requires That the Infringement Be Reviewed to Determine If It Is Necessary to Promote a Compelling State Interest.

The extent to which the Constitution requires the franchise to be extended within local governmental units has been measured by an emerging standard. At various times, the Court has considered whether a governmental unit has "power to make a large number of decisions having a broad range of impacts on all citizens of the county,"[1] whether a limitation upon the local franchise denies some citizens an "effective voice in the governmental affairs which substantially affect their lives,"[2] and whether such a limitation is applied to the selection of "persons by popular election to perform governmental functions."[3]

In examining statutory classifications challenged as being violative of the Equal Protection Clause, a court must first choose the degree of judicial scrutiny to be applied. The inquiry into the nature of local governmental power and its corresponding impact on the interests of

1. Avery v. Midland County, 390 U.S. 474, 483 (1968).

2. Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969).

3. Hadley v. Junior College Dist., 397 U.S. 50, 56 (1970).

the citizen is undertaken for this reason. "The character of the classification in question, the individual interests affected by the classification, and the governmental interests in support of the classification"[4] must be analyzed in order to select the level of scrutiny.

If an individual interest is "an established constitutional right, [the Court] gives to that right no less protection than the Constitution itself demands."[5] Such protection takes the form of strict scrutiny because, "where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely and carefully confirmed."[6]

The right to vote is "a fundamental right, because preservative of all rights"[7] requiring, as a consequence, that any infringement thereupon be carefully and meticulously scrutinized.[8] As Justice Douglas stated in *Harper* v. *Virginia State Board of Elections*, "[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."[9] The right to vote in state and local elections is "close to the core of our constitutional system"[10] and is entitled to rigorous protection by the courts. If it cannot be shown that statutory infringements upon voting rights are necessary to promote a compelling state interest, the statute should fall.

4. Dunn v. Blumstein, 405 U.S. 330, 335 (1972).

5. Shapiro v. Thompson, 394 U.S. 618, 642 (1969).

6. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966).

7. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

8. Reynolds v. Sims, 377 U.S. 533 (1964).

9. 383 U.S. at 665.

10. Carrington v. Rash, 380 U.S. 89, 96 (1965).

Exacting scrutiny also is applied to classifications found to be "suspect." When race or national origin are made the basis of withholding a benefit, the statute authorizing the distinction must be shown to be necessary to promote a compelling state interest.[11] The same close judicial scrutiny is applied to discriminations based on alienage. A state must meet this "heavy burden of justification"[12] if its exclusion of all aliens from either the state bar association[13] or competitive civil service employment[14] is to be permitted.

Classifications based on wealth also are "traditionally disfavored:"

> To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant.[15]

However, wealth discrimination, in and of itself, is not an "adequate basis for invoking strict scrutiny."[16] Strict review of "wealth classifications has been applied only where the discrimination affects an important individual interest."[17] The two criteria which normally will cause the invocation of strict scrutiny overlap in wealth discrimination cases. "Suspect classifications" and "fundamental rights" both may be discerned in the same fact situation.

11. McLaughlin v. Florida, 379 U.S. 184 (1964) and Korematsu v. United States, 323 U.S. 214 (1944).

12. *McLaughlin, supra* note 11 at 185.

13. *In re* Griffiths, 413 U.S. 717 (1973).

14. Sugarman v. Dougall, 413 U.S. 634 (1973).

15. *Harper, supra* note 6 at 668.

16. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 29 (1973).

17. *Id.* at 102, note 61 (Marshall, J., dissenting).

In *Harper*, for example, it is stated that, "Wealth, like race, creed or color, is not germane to one's ability to participate in the electoral process,"[18] thus identifying the criterion of a suspect classification, and that, "the right to vote is too precious, too fundamental to be so burdened," thus identifying the criterion of a fundamental right.[19]

State statutory and constitutional schemes are not uniformly subjected to strict scrutiny. The Federal Courts, rather, generally presume that the laws of a state are constitutionally sound: the law under examination must be "wholly irrelevant to the achievement of the regulation's objectives,"[20] in order to fail. "If any state of facts reasonably may be conceived to justify the statutory scheme,"[21] that scheme is constitutionally permissible.

Under the "rational basis" test, "state legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality."[22] Such a "wide scope of discretion" allows states the necessary latitude to conduct "effective regulation in the public interest."[23]

The presumption favoring constitutionality, however, does not attach to statutes which grant the franchise to residents on a selective basis. Such classifications have been carefully scrutinized to determine if each citizen has the opportunity for equal participation in the electoral process. The presumption of constitutionality gives way

18. 383 U.S. at 668.

19. 383 U.S. at 670.

20. Kotch v. Board of River Pilot Commissioners, 330 U.S. 552, 556 (1947).

21. McGowan v. Maryland, 366 U.S. 420, 426 (1961).

22. *Id.* at 425-426.

23. *Kotch, supra* note 20 at 556.

to strict scrutiny. It yields to the more stringent test because of the basis for the approval normally given to state law:

> [It is] based on an assumption that the institutions of state government are structured so as to represent fairly all people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.[24]

B. A Narrowed Application of the Test of Strict Scrutiny Would Be Inapplicable to the Case at Hand.

It has been argued in some quarters[25] that recent refusals by the Court to strictly scrutinize certain statutes, may be the harbingers of a severely narrowed application, or complete demise, of that test. *San Antonio Independent School District* v. *Rodriguez*[26] and *Rosario* v. *Rockefeller*[27] are cited as supporting this view. This thesis, even if correct, does little to shore up constitutional defects in the Texas plan.

The *Rodriguez* Court disagreed with the lower court holding that a school financing system was based on wealth and hence was a "suspect classification" to be strictly scrutinized. Mr. Justice Powell wrote that the district court's conclusion was arrived at "through a simplistic analysis"[28] which ignored the basic "threshold"[29] questions

24. *Kramer, supra* note 2 at 628.

25. Lee, *Mr. Herbert Spencer and the Bachelor Stockbroker: Kramer* v. *Union Free School District No. 15*, 15 Ariz. L. Rev. 457 (1973).

26. 411 U.S. 1 (1973).

27. 410 U.S. 752 (1973).

28. 411 U.S. at 19.

29. *Id.*

required of Equal Protection determinations. The unposed questions should have asked whether the poor as a class were capable of being defined in customary Equal Protection terms, and whether the relative nature of their deprivation was of "significant consequence."[30]

The Court found that while the class was undelineated, the claimed discrimination in *Rodriguez* might have been described as running against (1) persons with incomes below a certain level, (2) persons relatively poorer than other persons, or (3) persons residing in relatively poorer school districts.[31] The issue was framed as being whether the state had "been shown to discriminate on any of these possible bases and, if so, whether the resulting classification may be regarded as suspect."[32]

Persons with incomes below a certain level were not shown to be discriminated against by the state law. In making this determination, the other cases of wealth discrimination previously decided by the Court were examined. The shared characteristics of those cases were the inability to pay for the desired benefit and the "absolute deprivation of a meaningful opportunity to enjoy that benefit."[33] This first category of poor was shown not to be discriminated against by the financing system because no evidence established that its members were concentrated in the poorest districts. Moreover, the poor in industrial areas might well be located in relatively wealthy districts. The *Rodriguez* appellees also failed to show that the impecunity of the class caused an "absolute deprivation of the desired benefit."[34] The Court held that no such depriva-

30. *Id.*

31. 411 U.S. at 19-20.

32. 411 U.S. at 20.

33. *Id.*

34. 411 U.S. at 23.

tion had occurred: The state had met its self-imposed minimal standards and children in all districts were guaranteed an adequate education.

The Court also discarded the second and third potential definitions of a disadvantaged poor class. The Court could discern no factual basis "upon which to found a claim of comparative wealth discrimination"[35] against the second category, the "relative poor". The final category, composed of persons in the poorer school districts, was neither reduced to "a position of political powerlessness"[36] nor subjected to any of the other "traditional indicia of suspectness."[37] Thus, the Court disallowed the application of strict scrutiny on the grounds of a suspect classification.

The class of persons delineated in the instant case is totally dissimilar to the *Rodriguez* categories. Eligible Fort Worth voters are divided into two classes by the Texas constitutional and statutory rendering requirements. Those who do not render cannot vote in bond elections and are thereby disenfranchised in elections which affect the citizenry as a whole.

The *Rodriguez* appellees additionally urged that education is a fundamental right entitled to the protection of strict scrutiny. If explicitly or implicitly guaranteed by the Constitution, a right may be said to be fundamental, and any infringement upon that right will be carefully and meticulously scrutinized.[38] The Court reaffirmed that "education is perhaps the most important function of state and local governments,"[39] but was unpersuaded that it

35. 411 U.S. at 27.

36. 411 U.S. at 28.

37. *Id.*

38. 411 U.S. at 33-34.

39. 411 U.S. at 29 quoting Brown v. Board of Education, 347 U.S. 483 (1954).

was a fundamental right. The appellees sought to place education within the sphere of strict judicial scrutiny by arguing that its essential relation to the First Amendment Rights made it implicitly fundamental. This argument was rejected.

> [W]e have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* or the most *informed* electoral choice.[40]

According to *Rodriguez*, education may assist fundamental rights, but it cannot thereby become fundamental.

The Texas rendering requirement, unlike the school financing scheme, *does* intrude on "the constitutionally protected right to participate in elections on an equal footing with other citizens in the jurisdiction."[41] Although the right to vote in state elections is "nowhere expressly mentioned"[42] in the Constitution, "the right of all persons to vote, once the state has decided to make it available to some, becomes a basic one under the Constitution."[43]

In *Rosario*, the Court upheld a New York statute which required persons wishing to vote in a political party's primary to enroll in that party at least thirty days prior to the last general election preceding the primary. The would-be voter who challenged the registration provision argued that in order to be held constitutional, the provision would have to be necessary to promote a compelling state interest. The Court did not accept that contention because in the cases cited in support of strict scrutiny "the state totally denied the electoral franchise to a particular class of resi-

40. 411 U.S. at 36 (emphasis original).

41. 411 U.S. at 34, note 74 *quoting Dunn* v. *Blumstein*, *supra* note 4 at 336.

42. *Harper*, *supra* note 6 at 665.

43. *Rosario*, *supra* note 27 at 764 (Powell, Douglas, Brennan, Marshall, J.J., dissenting).

dents, and there was no way in which the members of that class could have made themselves eligible to vote."[44]

The New York law did not absolutely disenfranchise the plaintiff class, it "merely imposed a time deadline on their enrollment, which they had to meet in order to participate in the next primary."[45] The law was adopted in service of the goal of preserving "the integrity of the electoral process."[46] The declared supporters of a particular party were kept within their party's primary. Party "raiding" or "crossovers" were effectively curtailed.

Rosario cannot be read as allowing onerous conditions to be placed on voter registration. It would be untenable to argue that the poll tax could be revived because "members of the class could [make] themselves eligible to vote."[47] It is equally clear that the unconstitutional practices struck down in *Williams* v. *Rhodes*[48] and *Bullock* v. *Carter*[49] could not be reinstated just because potential candidates could make themselves eligible to be placed on the ballot.

A Fort Worth voter might make himself eligible to vote in a bond election, but the rendering requirement is totally unrelated to "the integrity of the electoral process."[50] As the District Court correctly pointed out, *Rosario* does not stand for the allowance of a conditional right to vote based on submission to taxation.[51]

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44. 410 U.S. at 757.

45. *Id.*

46. 410 U.S. at 761.

47. 410 U.S. at 757.

48. 393 U.S. 23 (1968).

49. 405 U.S. 134 (1972).

50. 410 U.S. at 761.

51. Stone v. Stovall, 377 F. Supp. 1016, 1020, note 8 (W.D. Tex. 1974), *prob. juris. noted sub nom.* Hill v. Stone, 95 S.Ct. 37 (1974) (mem.).

In urging that *Rodriguez* and *Rosario* have confined the test of strict scrutiny to "restricted circumstances,"[52] Appellant has overlooked the fact that the Texas rendering scheme creates such a circumstance. Even if the Court has checked the "expansibility of the list of fundamental rights,"[53] the right to vote in local elections is constitutionally protected. A radical and, as yet, unforeseen demise of strict scrutiny would have to occur before the Texas plan could prevail. It is submitted that Appellant's argument, when fully developed, suggests that the Court disregard or misapply a series of decisions which safeguard equal political participation.

C. Strict Scrutiny Is the Test to Be Applied to Any Alleged Dilution or Debasement of Voting Rights in a Unit of Local Government Having a Broad Range of Impacts on All Citizens.

The District Court holding is based in large part upon *Reynolds* v. *Sims*.[54] The extensions of the *Reynolds* standard, as set out in *Avery* v. *Midland County*,[55] *Kramer* v. *Union Free School District*,[56] *Cipriano* v. *Houma*,[57] *Hadley* v. *Junior College District*[58] and *Phoenix* v. *Kolodziejski*,[59] together with its exception, as applied in *Salyer Land Co.* v. *Tulare Lake Basin Water Storage District*,[60] comprise much of the body of law applicable to the case at hand.

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52. Brief of Appellant at 21.

53. Goodpaster, *The Constitution and Fundamental Rights*, 15 Ariz. L. Rev. 479, 500 (1973).

54. 377 U.S. 533 (1964).

55. 390 U.S. 474 (1968).

56. 395 U.S. 621 (1969).

57. 395 U.S. 701 (1969).

58. 397 U.S. 50 (1970).

59. 399 U.S. 204 (1970).

60. 410 U.S. 719 (1973).

The lower court agreed with Appellees that "the state, through its rendering requirement, has divided its otherwise eligible voters into two classifications, one of which cannot vote in bond elections."[61] The state was required to "justify the exclusions under the harsh 'compelling state interest' test"[62] because it had denied some residents the right to vote. This test previously has been applied to various classifications which had either diluted or denied voting rights.

In *Reynolds*, the Court held that each citizen is guaranteed, under the Equal Protection Clause, the opportunity for a full and effective voice in his state's legislature. A dilution or debasement of this right through the malapportionment of voting districts is violative of the Equal Protection Clause. The facts before the *Reynolds* Court showed that glaring discrepancies existed among the populations of the various legislative districts, with the result that residents of different districts did not have votes of equal weight. Reviewing the state law authorizing the malapportionment with strict scrutiny, the Court held that legislative apportionment must be based on population:

> The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places, as well as all races.[63]

The doctrine of "one person, one vote" was extended to local government in *Avery* v. *Midland County*.[64] The Court recognized that regardless of how the state exercises its power, whether directly or through a subdivision, the

61. *Stone*, *supra* note 51 at 1019-20.

62. *Id.* at 1020.

63. *Reynolds*, *supra* note 54 at 568.

64. *Supra* note 55.

limits of that power are proscribed by the Equal Protection Clause. Like *Reynolds*, *Avery* is concerned with malapportionment. Population imbalance in local voting units, in this case the county commissioners' districts, had diluted the strength of the county's only urban area, while artificially bolstering that of the less populous areas. The urban center, having a population far greater than all other combined areas of the county, was represented by one commissioner, while the remainder of the county was represented by three commissioners.

The Court held that every qualified resident had the right to a ballot of equal weight. The facts of *Avery* supported such a ruling because certain local governmental entities, like their statewide counterparts, engage in diverse governmental functions affecting the citizenry as a whole. The county commissioners' court qualified as such because it possessed the "power to make a large number of decisions having a broad range of impacts on all the citizens of the county."[65] Substantial variations from equal population within district boundaries of units with "general responsibility and power for local affairs"[66] cannot be sanctioned.

In applying the rule in *Reynolds* to *Avery*, the Court reserved for future consideration the issue of whether the rule would be applicable to local governments having an *unequal* effect on different groups of citizens:

> Were the Commissioners Court a special-purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents, we would have to confront the question whether such a body may be apportioned in ways which give greater influence to the citizens most

65. 390 U.S. at 483.

66. *Id.*

affected by the organization's functions. That question, however, is not presented by this case.[67]

Avery was limited to "units of local government having general governmental powers over the entire geographic area served by the body."[68]

D. Citizens of Requisite Age and Residency May Not Be Denied the Right to Vote in Local Elections in Which They Are Substantially Interested and Affected.

The Equal Protection Clause also reaches statutory classifications which deny the right to vote. While *Reynolds* and *Avery* dealt with population imbalance and its resultant weighted voting, the case of *Kramer* v. *Union School District*[69] was concerned with the outright denial of voting rights to a particular class. In striking down the law authorizing this practice, the Court applied "no less rigid examination to statutes *denying* the franchise" than to statutes which might "dilute the effectiveness of some citizens' votes."[70]

The challenged statute restricted voting in local school board elections to resident citizens over the age of 21 years who also were (1) owners or lessees of real property within the district, (2) a spouse of an owner or lessee, or (3) a parent or guardian of a child enrolled in a district school during the preceding year. The state asserted that it had a legitimate interest in limiting the vote to "those primarily interested in such elections."[71] In addition to the parents

67. 390 U.S. at 484.
68. 390 U.S. at 485.
69. *Supra* note 56.
70. 395 U.S. at 626 (emphasis original).
71. 395 U.S. at 631.

of school children, who have an obvious interest, the state argued that owners of real property, who paid taxes to support the schools directly, and lessees of real property, who paid these taxes indirectly, were "primarily interested."

In closely scrutinizing the restriction placed on the excluded voters, the Court found that the statute included "many persons who have, at best, a remote and indirect interest in school affairs and, on the other hand, exclude[d] others who have a distinct and direct interest in the school meeting decisions."[72] The excluded class member who brought suit argued that, although he was neither a parent nor a real property owner or lessee, he and other "members of the community have an interest in the quality and structure of public education."[73]

By crediting the class members with having an interest, the Court recognized that a person need not financially support the school or be responsible for a student to have a justiciable interest in public education. In sum, the persons disenfranchised for board elections were not "substantially less interested or affected than those the statute includes."[74]

Left open, however, was the issue of whether the state might be permitted to limit the franchise in situations where one group of citizens actually was "primarily interested or affected"[75] by the activities of the unit of government. The *Kramer* decision turned upon the fact that the statute was not "sufficiently tailored to limiting the franchise to those 'primarily interested' in school affairs to

72. 395 U.S. at 632.
73. 395 U.S. at 630.
74. 395 U.S. at 632.
75. *Id.*

justify the denial of the franchise."[76] The statute was imprecise, wrongfully including "interested" citizens within its prohibition. It was possible, therefore, that a carefully drawn statute might withstand the constitutional test. But the Court noted:

> Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.[77]

Decided on the same day as *Kramer* was the suit of *Cipriano* v. *City of Houma*.[78] At issue was the constitutionality of a state law which, like that of *Kramer* forbade a group of citizens to vote in a certain election. The two suits differed from one another in that the purpose of the *Cipriano* election was not to choose public officials, but was to determine if utility revenue bonds should be issued. The municipality owned the utility systems and planned to use the bond sale proceeds to improve the city's gas, water and electric service. Approval by a majority of the property taxpayers, representing a majority of the value of all assessed property owned by the voters in an election, was necessary for the bonds to be isued.

The city resisted the attack on the state law which authorized the limited franchise, maintaining that the property owners had a " 'special pecuniary interest' in the

76. 395 U.S. at 633.

77. 395 U.S. at 626-27.

78. *Supra* note 57.

election, because the efficiency of the utility system directly affects 'property and property values' and thus 'the basic security of their investment in [their] property [is] at stake.' "[79]

Because the revenue bonds were to be paid by utility operations, supported in turn by all persons who used those services, the interest of the property owners was no greater than any other utility subscriber. The respective interests of the citizenry were equal:

> [T]he benefits and the burdens of the bond issue fall indiscriminately on property owned and non-property holder alike.[80]

Consequently, the statute did not satisfy the "exacting standards of precision"[81] required of limitations upon the franchise.

E. The Test of Strict Scrutiny Is Applicable to Governmental Units Having Governmental Powers Less Than Those Examined in Avery v. Midland County.

In *Hadley* v. *Junior College District*,[82] the "one person, one vote" doctrine of *Reynolds* was examined once again. The voting districts for junior college trustees were challenged as being malapportioned. The Court held that the trustees must "be apportioned in a manner that does not deprive any voter of his right to have his own vote given

79. 395 U.S. at 704.

80. 395 U.S. at 705.

81. 395 U.S. at 706 *quoting Kramer, supra* note 56 at 632.

82. *Supra* note 58.

as much weight, as far as is practicable, as that of any other voter in the junior college district."[83]

As in *Avery*, the touchstone was the "general governmental powers over the entire geographic area"[84] possessed by the board of trustees. Although its powers were not as broad as those of the Midland County Commissioners, the trustees, nonetheless, performed important governmental functions which were "general enough" and had "sufficient impact throughout the district"[85] to make the trustee selection process answerable to the Fourteenth Amendment. Moreover, the Court held that:

> [A]s a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in the election. . .[86]

The Court stressed, as it had done in the past, that this rule might not reach the extremes of the governmental spectrum:

> It is of course possible that there might be some case in which a state elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with Reynolds, supra, might not be required. . .[87]

Concrete exceptions might exist, but they had yet to be brought before the Court.

83. 397 U.S. at 52.
84. 397 U.S. at 53 *quoting Avery, supra* note 55 at 485.
85. 397 U.S. at 54.
86. 397 U.S. at 56.
87. *Id.*

F. The Indirect Tax Contributions Made Through Rents and Costs by Residents Owning No Real Property Must Be Taken into Account in Weighing Equal Protection Claims.

No exception to the rule in *Kramer* was to come forth in *Phoenix* v. *Kolodziejski*,[88] the next case to test a restrictive franchise. The issue before the *Phoenix* Court was stated as follows:

> Does the Federal Constitution permit a state to restrict to real property taxpayers the vote in elections to approve the issuance of general obligation bonds?[89]

The Court affirmed the lower court holding that the restriction was unconstitutional under the guidelines of *Cipriano* and *Kramer*.

The City of Phoenix took the position that general obligation bonds, unlike the revenue bonds of *Cipriano*, place an unavoidable burden on the real property owners because the bonds are "in effect a lien on the real property subject to taxation."[90] Because of this special status, the State of Arizona felt justified in recognizing "the unique interests of real property owners."[91] The entire community would benefit from the civic improvements caused by the bonds' passage, but the burden was to be placed on the property owners.

This argument failed because the Court found that:

> The differences between the interests of property owners and the interests of non-property owners are

88. *Supra* note 59.
89. 399 U.S. at 205.
90. 399 U.S. at 208.
91. *Id.*

not sufficiently substantial to justify excluding the latter from the franchise.[92]

This was obviously the case as to a portion of the debt service requirements of the bonds. Revenues from other local taxes paid by both property holders and non-property holders were to be applied to service the bonds. With non-property owners contributing to the bond servicing, it was difficult to maintain that they did not have an interest equal to the owners. Stated differently, the owners could not be said to have a special interest.

It was equally difficult to overlook the significant interest non-owners had in the public improvements to be financed by the bonds. All citizens are affected by the facilities and services a city offers the public at large. One need not be financially affected to have an interest in parks and playgrounds, police and public safety buildings, and libraries.

The main thrust of *Phoenix*, however, is not the protection of these clearly evident interests, but the recognition of the indirect tax burden borne by the non-owners. The Court took into account the fact that property taxes, the very basis for extending exclusive voting privileges to the owners, are also paid by non-owners. The payment is indirect, but it is meaningful: Landlords pass property taxes on to the renter, while commercial establishments pass the taxes on to the consumer. The property tax is a business expense ultimately paid by persons other than the property owner. A selective franchise, granting the owners the power to decide civic issues affecting all citizens is constitutionally defective.

92. 399 U.S. at 209.

II. The Holding in Salyer Land Co. v. Tulare Lake Basin Water Storage District Is Inapplicable to the Case at Hand.

Phoenix, like the other progeny of *Reynolds*, required the statute in question to be necessary to promote a compelling state interest. A particular statutory classification might either restrict the franchise or dilute the effectiveness of the franchise, but in both cases the statute was strictly scrutinized. *Kramer* invoked the test of strict scrutiny when a restriction denied some citizens "any effective voice in the governmental affairs which substantially affect their lives."[93] *Hadley* applied strict scrutiny when citizen participation in a "popular election [of persons] to perform governmental functions"[94] had been diluted.

The exception to the doctrine of "one person, one vote", the possibility of which both these cases acknowledged, finally took form in *Salyer Land Co.* v. *Tulare Lake Basin Water Storage District*.[95]

The facts of *Salyer* combine elements previously seen in both the restriction and dilution cases. The board of directors of a California water storage district was chosen by an electorate restricted to real property owners whose votes then were weighted according to the amount of land the voter owned. As land ownership was the sole requirement, corporations were allowed to vote. Residency was not required.

In upholding these provisions, the Court did not subject them to strict scrutiny:

93. 395 U.S. at 627.

94. 397 U.S. at 56.

95. *Supra* note 60.

> Although relying on the fact that prior cases had left open the possibility that preferential voting for special-function units might be valid, the *Salyer* Court did not apply the strict scrutiny actually used in those cases to review the permissibility of voting restrictions and dilutions.[96]

Instead, the Court employed the "rational basis" test, which asks if the statutory scheme is "wholly irrelevant to the achievement of the regulation's objectives"[97] or "if any state of facts reasonably may be conceived to justify"[98] the scheme. Under this standard *Salyer* held that the state could rationally allow those whose land would be subjected to taxes to exert control over the water storage district. It was reasoned that the state could conclude that without a guarantee of electoral primacy, a sufficient number of landowners might not be inclined to vote for the creation of the district.

The excluded lessees might have interests similar to landowners, but the "rational basis" test merely inquires if "any reasonable state of facts may be conceived to justify the exclusion."[99] Such a conception, noted by the Court, maintained that leaseholds might be manipulated by their owners, whereby short-term leases, and incidental voters, would be created for the purpose of controlling an election. California could limit the franchise to prevent such an occurrence as well as to encourage owners to participate without fear of election irregularities.

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96. *The Supreme Court, 1972 Term*, 87 Harv. L. Rev. 94, 97 (1973).

97. 410 U.S. at 730 *quoting Kotch* v. *Board of River Pilot Commissioners*, *supra* note 20 at 556.

98. 410 U.S. at 732 *quoting McGowan* v. *Maryland*, *supra* note 21 at 426.

99. *Id.*

Similarly, the state could allow weighted voting. The benefits to the land are "uniform as to all acres affected"[100] and the cost to each landowner is the same per acre. Writing for the majority, Mr. Justice Rehnquist agreed with the lower court finding that "the benefits and burdens to each landowner . . . are in proportion to the assessed value of the land."[101] Therefore, the California legislative decision to permit voting in the same proportion was found to be rationally based.

Salyer applied the less severe test because the water storage district exercised limited functions which disproportionately affected landowners:

> [T]here is no way that the economic burdens of the district operations can fall on residents *qua* residents, and the operation of the districts primarily affect the land within their boundaries.[102]

The board of directors, then, are "functionaries whose duties are . . . far removed from normal governmental activities."[103]

Salyer does not spell an end to the strict judicial protection of those interests recognized in the *Reynolds* line of cases. The recognition of a citizen's interest in education, unconnected to any economic stake,[104] still is valid. The recognition of a citizen's interest in civic improvements, brought about in part by indirect tax contributions through rents and costs,[105] still has force and effect.

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100. 410 U.S. at 734.

101. *Id.*, *quoting* 342 F. Supp. 144, 146 (E.D. Cal. 1972).

102. 410 U.S. at 729.

103. *Hadley* v. *Junior College Dist.*, *supra* note 58 at 56.

104. *Kramer* v. *Union Free School Dist.*, *supra* note 56.

105. *Phoenix* v. *Kolodziejski*, *supra* note 59.

The importance of *Salyer* lies in its analysis of the disparate interests of competing groups. The analysis suggested by the Court initially takes into account the interests of definable groups classified as such by statute. A finding that one group's interest is disproportionately affected by a "far removed" unit of government will cause strict protection of the less affected group to be abandoned. The infringements upon the latter group's right will be measured by the "rational basis" test.

The *Salyer* Court did not suggest that preferential review would be granted merely because one group might be affected to a greater degree, or in a different manner, than another group. The "effect" must reach a disproportionate level: that it is greater or different is not enough. Strict scrutiny of infringements on the rights of a competing group will not give way unless this level is attained.

The test announced by the Court is said to have a potential for misapplication because:

> "Although the result in *Salyer* seems sound, a superficial analysis in future cases could give inadequate protection to the constitutional right of equal political representation."[106]

This potential lies in the interrelated use of the phrases "specialized units of government" and "disproportionate effects." The combined use of these analytic tools "encourage[s] a tendency to presume that, if a unit does engage in activities not normally provided by a governmental unit, its impact will be disproportionate."[107] The author of this thesis warns that it is possible to have a specialized

106. Note, *Salyer Land Co. v. Tulare Lake Basin Water Storage District: Opening the Floodgates in Local Special Government Elections*, 72 Mich. L. Rev. 868 (1974).

107. *Id.* at 884.

unit that has a substantially equal effect on all citizens.[108] Effects that vary to a small degree should not be construed as disproportionate just because they emanate from a unit far removed from normal government activities.

The College District would urge that even if a bond election could be viewed as a specialized governmental function, it should not be concluded automatically that the effect of the bond's passage is disproportionate.

Reynolds spoke of legislators representing "people, not trees or acres,"[109] and of representatives "elected by voters, not farms or cities or economic interests."[110] In *Salyer* the Court examined a governmental unit whose purpose was held to be so limited that it approximates the references made in *Reynolds*. The water district "focuses on the land benefited, rather than on people as such."[111]

The case at hand and that of the El Paso Junior College District are concerned with general purpose districts which substantially affect all citizens.[112] Both districts focus directly upon people and any limitation upon the franchise must be examined by the *Reynolds* line of cases.

Texas elections conducted "for the purpose of issuing bonds or otherwise lending credit or expending money or assuming any debt"[113] unconstitutionally limit the franchise to qualified residents who own taxable property and who have rendered same for taxation. The classification set out in the constitutional and statutory provisions of

108. *Id.*

109. 377 U.S. at 562.

110. *Id.*

111. 410 U.S. at 730.

112. *See infra* text accompanying notes 127 through 136.

113. TEX. CONST. art. VI §3a.

Texas contains "an exclusion from what [is] otherwise a delineated class."[114] In this respect, the classification is much like that of *Kramer*: the franchise is open to all residents of requisite age and citizenship, but with exceptions. The *Salyer* classification enfranchised landowners regardless of residency, but extended the franchise no further. For the *Salyer* Court, allowing others to vote would have required engrafting a wholly new class of voters upon the statutory scheme.[115] This is not the case in Texas where the state has granted the franchise universally and then placed a restriction, inconsistent with Equal Protection, upon that grant.

The District Court did not err when it wrote that the principle of "one man, one vote" applied "to the City of Fort Worth, a unit of local government exercising general governmental power."[116] The City obviously performs broad governmental functions, one of which is the maintenance of a library system. The financial stake of renderers is not disproportionate to the non-economic stake of all Fort Worth citizens in public libraries. Any difference between the tangible interests of the citizens is minimized by the indirect contributions by non-renderers to the taxes which will service the bonds.[117] The *Salyer* ruling does not apply to the case at hand.

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114. 410 U.S. at 730.

115. *Id.*

116. *Stone*, *supra* note 51 at 1021, note 9.

117. This does not mean that the franchise could be extended *ad infinitum* to consumers "in far away metropolitan areas" who might be arguably affected by taxes on Fort Worth goods and services. The *Salyer* Court expressed concern over such an argument because the Tulare Lake Basin Water Storage District did not condition voting on residency, but upon land ownership. 410 U.S. at 30-731. In general purpose districts, few of which allow corporations or non-residents to vote, the franchise would be proscribed by citizenship, residence and age requirements.

III. The Texas Constitutional and Statutory Provisions Restricting the Franchise in General Obligation Bond Elections to Persons Who Have Rendered Property for Taxation Is Violative of the Equal Protection Clause of the Fourteenth Amendment.

A. The Restrictive Franchise Excludes Citizens Who Have a Stake in, and Will Be Affected by, the Outcome of General Obligation Bond Elections.

The restrictions of the Texas franchise differ somewhat from the laws invalidated in *Kramer* and *Phoenix*. The state, consequently, has offered different justifications for its limited franchise. All defenses of its voting scheme center on the fact that Texas does not limit voting rights to real property holders only. All property, except as may be exempted, is subject to taxation,[118] and any person who renders his real, personal or mixed property may vote in a bond election,[119] provided he is otherwise qualified. As the Texas Supreme Court stated in *Montgomery Independent School District* v. *Martin*,[120] the elector who renders a bicycle may cast a vote equal to that of a man who owns a herd of cattle.[121]

Montgomery justifies the state voting classification on the grounds of "sound government" and "equal treatment of all citizens."[122] By conditioning the vote upon rendering property for taxation, it is reasoned, an inducement is provided "for those who wish to participate in the decision

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118. TEX. REV. CIV. STAT. ANN. art. 7145 (1960).

119. TEX. ELECTION CODE ANN. arts. 5.03, 5.04 (Supp. 1974).

120. 464 S.W. 2d 638 (Tex. 1971).

121. *Id.* at 640. *See* Handy v. Holman, 281 S.W. 2d 356 (Tex. Civ. App.—Galveston 1955, no writ).

122. 464 S.W. 2d at 641.

making process . . . to assume their rightful portion of the burden they help to create."[123] *Montgomery* is premised upon a feeling that it is basically unfair to allow non-renderers to vote, "and at the same time permit them to avoid their fair share of the resulting obligation."[124] Because there is a correlation between the rights of the citizen and the obligations of citizenship,[125] it is permissible to induce the citizenry to come forward to share in the tax burden. To allow non-rendering citizens to place rendering citizens under a financial obligation by the issuance of bonds "would confer preferential rights."[126]

While the statutes examined in *Kramer* and *Phoenix* conditioned the franchise differently than does Texas, the rights defined in those cases have direct bearing on the case at hand. While renderers (assuming that they subsequently pay the tax) will be financially affected by a general obligation bond election, other citizens will be substantially affected in the election's outcome. Under *Kramer*, "the Court's concept of 'interest' will not permit the exclusion of residents who do not own property, since they share a concern for and a stake in the quality"[127] of general civic improvements. Under *Phoenix*, any substantial difference between owners and non-owners is minimized by the indirect contribution to property taxes by non-owners through increased rents and costs.

The Texas Court defines "affect" exclusively in economic terms, but fiscal considerations are not the only

123. *Id.*

124. 464 S.W. 2d at 641-42.

125. Markowsky v. Newman, 134 Tex. 440, 136 S.W. 2d 808 (1940).

126. 464 S.W. 2d at 642.

127. *The Supreme Court, 1968 Term*, 83 Harv L. Rev. 7, 81 (1969).

interests to be weighed in examining Equal Protection challenges:

> [T]he Equal Protection Clause is not satisfied by a finding that it was reasonable to recognize the special interest property owners have in a bond issue; the laws are unacceptable in they exclude non-property electors who have a substantial stake in the result of the election.[128]

Paralleling the argument that citizens are substantially affected only in economic terms, is the argument that non-renderers will not vote "either cautiously or intelligently" unless they have an economic stake in the election.[129] Intelligence or caution have never been based on economic factors, and to argue that they are is to urge the introduction of "wealth as a measure of a voter's qualifications."[130] A non-rendering citizen of Fort Worth may determine the need for a library with a facility equal to the wealthiest citizen's.

One of the several cases held inapplicable by the *Montgomery* Court was *Stewart* v. *Parish School Board*,[131] where a three judge court examined a voting scheme similar to that of Texas. Bond electors were required to be property taxpayers. The Louisiana Constitution additionally required that all bond issues be approved by voters owning a majority of the assessed property, thereby giving more weight to the vote of the large property owners. *Stewart* held both the exclusion of non-property taxpayers and the dilution of the vote of the small property owners to be in violation of the Equal Protection Clause.

128. Stewart v. Parish School Board, 310 F. Supp. 1172, 1176 (E.D. La. 1970), *aff'd*, 400 U.S. 884 (1970) (mem.).

129. Brief of Appellant at 18.

130. *Harper*, *supra* note 6 at 668.

131. *Supra* note 128.

Montgomery distinguished *Stewart* as turning upon the inequity of the weighted voting, and as having, therefore, no effect on the Texas plan.[132] By ignoring the case in its entirety, the Texas Court failed to consider the portion of the opinion that was applicable: the finding that the limited franchise was unconstitutional. This especially merited discussion because the Louisiana Law, like the law of Texas, provided that "all properties situated within the state . . . shall be subject to taxation."[133]

The Louisiana restriction, according to *Stewart*, was based on the apparent assumption that property owners have a special pecuniary interest. This is not unlike *Montgomery's* finding that persons permitted to vote "must assume their rightful portion of the burden they help to create."[134]

The *Stewart* Court questioned the presumption that property owners are more competent to vote in bond elections than non-property owners, noting that under such a presumption it is possible to disenfranchise a bank president who happens to rent rather than own his own home.[135] It required that "the general public interest must be weighed against allowing a particular private group decide whether a public school be built and where."[136] In Texas, renderers hold a veto power over the civic improvements desired by the public at large, many of whom have non-economic or indirect economic stakes in those improvements.

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132. 464 S.W. 2d at 640.

133. LA. STAT. ANN. art 47: 1951-1956.

134. 464 S.W. 2d at 641.

135. 310 F. Supp. at 1178 *quoting* Note, 55 Va. L. Rev. 559, 566 (1969).

136. 310 F. Supp. at 1178.

B. The Restrictive Franchise Is Not Necessary to Promote Any Compelling State Interest.

Montgomery alludes to the state's interest in "spreading the obligations of government equally",[137] but does not determine if Texas has a compelling state interest, and if the rendering scheme is necessary to promote it. The absence of any discussion of this issue has led one commentator to state:

> One reason for the avoidance of a direct confrontation with the compelling state interest test may rest in the apparent absence of such a constitutionally compelling interest. But again this forces one to question the wisdom of the supreme court in entirely avoiding an issue so fundamental to the equal protection clause. While the "obligation of citizenship" argument raised by the court merits some philosophical discussion, it is extremely questionable that the discusssion of an issue as important as voting rights and the compelling state interest question should be neglected under the auspices of a theoretical "you can't get something for nothing" attitude.[138]

Rendering appears to be an "interest" or goal in itself because the vote is said not to depend on actual payment of the tax.

If "sound government" and "equal treatment of all citizens" could be viewed as definable compelling interests, they are not served by the Texas Constitution and statutes. A citizen desiring to vote in a bond election, yet unwilling to reveal his full assets, could render personalty

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137. 464 S.W. 2d at 641.

138. Note, *Property Ownership Versus the Right to Vote: A Question of Equal Protection*, 25 Sw. L. J. 633, 643 (1971).

of small value and be allowed to cast a ballot. He thereby would avoid paying his fair share; indeed, he could refuse to pay *any* share and still be permitted to vote. Residents are not goaded into disclosing their wealth by the restrictive franchise:

> The law will achieve its purpose only for that minute segment of the electorate so close to destitution that to render any property necessitates rendering all. The restriction will thus compel few citizens to render all their property for taxation; consequently, it has little impact on revenue production. Therefore, no appropriate compelling state interest has been advanced to justify this restriction of the franchise.[139]

In the instant case, Judge Thornberry correctly focused on the questionable necessity of rendition when he asked, "If disenfranchisement can be avoided by rendering only a small portion of one's property, and a nearly valueless portion at that, how does the state further its interest in protecting the fisc?"[140]

C. The Restrictive Franchise Places an Unequal Burden on Citizens Who Own Property Unsought for Taxation by the State.

The inequity of Texas' restricted franchise is amplified by the state's irrational property taxation system. All citizens of requisite age and residency are potential property taxpayers and, by definition, voters in bond elections. *Montgomery* assumes, without directly speaking to it, that all citizens are under a duty to come forward and render their

139. Note, 49 Texas L. Rev. 1113, 1118 (1971).

140. *Stone, supra* note 51 at 1022.

property.[141] The only statute cited by the Court as related to this issue is Article 7145, which provides that, "All property, real, personal or mixed, except such as may be hereinafter expressly exempted, is subject to taxation, and the same shall be rendered and listed as herein prescribed."[142] The impetus for rendition, however, comes not from the state's ill-defined duty of citizenship, but from the local tax assessor-collector. This official is required as follows:

> . . . take a list of taxable property, real and personal, in his county and assess the value thereof in the man-

141. One of the most direct statements of the duty to render is not found in Title 122 of the Texas Revised Civil Statutes, the general taxation statutes, TEX. REV. CIV. STAT ANN. arts. 7041 *et seq.* (1960), but in Title 28 of the Texas Revised Civil Statutes. TEX. REV. CIV. STAT. ANN. art. 1043 (1963). Article 1043 states that each person, partnership and corporation owning property within the municipal corporation's limits shall "hand to the city assessor and collector a full and complete sworn inventory of the property possessed or controlled. . ." The annual time for rendition, however, has been held to be "directory" rather than "mandatory". Bose v. Ainsworth, 139 S.W. 2d 307 (Tex. Civ. App.—San Antonio 1940, error dismd.). Title 122 appears to leave the initiative in the hands of the assessor. TEX. REV. CIV. STAT. ANN. arts. 7151 (Supp. 1974), 7189 (1960). *See also* TEX. REV. CIV. STAT. ANN. art. 7152 (Supp. 1974). Professor Yudof has written:

> Texas statutes direct taxpayers to list or render all taxable property upon request by the assessor. Nonetheless, the only legal burden imposed on a taxpayer who fails to render voluntarily is the denial of access to the local board of equalization, which may grant an exception. Because rendition is not mandatory, the statutes require the assessor to call on every taxpayer to request a listing of all property. (citations omitted)
>
> Yudof, *The Property Tax in Texas Under State and Federal Law*, 51 Texas L. Rev. 855, 889-90 (1973).

The assessor is empowered to retroactively assess both real and personal property which he shall "discover" have not been assessed or rendered previously. TEX. REV. CIV. STAT. ANN. arts. 7207, 7208 (1960); Yamini v. Gentle, 488 S.W. 2d 839 (Tex. Civ. App.—Dallas 1972, writ ref. n.r.e.).

142. TEX. REV. CIV. STAT. ANN. art. 7145 (1960).

> ner following, to-wit: By calling at the office, place of business or the residence of the person, and listing the property required by law in his name, and requiring such person to make a statement under said oath of such property in the form hereinafter prescribed.[143]

Owners shall list for taxation, during a specific annual time period, all property "when required by the assessor, with reference to the quantity held or owned on the first day of January in the year for which the property is required to be listed or rendered."[144]

The assessor becomes "a sort of one-man legislature"[145] whose assessment and collection practices are inefficient and subject to local political pressure.[146] In addition, he indirectly dictates the size of the electorate in bond elections. Virtually every person he "calls upon" becomes a voter. If the potential taxpayer refuses to render, the assessor must make a "valid and binding"[147] assessment of the property "as if such property had been rendered by the proper owner thereof."[148] The assessor's placement of the property on the rolls, even without the owner's consent, entitles the owner to vote in bond elections, provided that he is otherwise qualified.[149] The number of bond issue

143. TEX. REV. CIV. STAT. ANN. art. 7189 (1960).

144. TEX. REV. CIV. STAT. ANN. art. 7151 (Supp. 1974).

145. 1 ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, THE ROLE OF THE STATES IN STRENGTHENING THE PROPERTY TAX 4 (1963), *quoted* by Yudof, *supra* note 141 at 886.

146. "Most taxpayers would be outraged if the assessor actually complied with the applicable laws on the property tax base. An assessor who insisted on taxing personal property would be courting political suicide." Yudof, *supra* note 141 at 889.

147. TEX. REV. CIV. STAT. ANN. art. 7193 (1960).

148. *Id.*

149. *Montgomery*, *supra* note 120 at 641; Royalty v. Nicholson, 411 S.W. 2d 565, 575 (Tex. Civ. App.—Houston 1967, writ ref. n.r.e.).

voters is in direct proportion to the energy the assessor expends in seeking out property.

It is extremely doubtful that a property owner will even know of the possibility of rendering, much less actually undertake to render, unless he is requested to list his property. As the District Court observed, "The record fails to indicate the number of people who render, for taxation personalty other than automobiles, but we doubt that many do."[150] This doubt echoed the finding of the three judge court in *Stewart* where judicial notice was taken "of the fact that in Louisiana few individuals pay any personal property taxes; those who do pay a nominal tax usually based on the value of their automobile."[151] In Texas most personalty is not rendered because the assessor never requires its rendition. The discretion of the assessor is great and the tax base varies from county to county. Professor Yudof has written that the broad tax base which includes all property has eroded:

> [It] results from the helter-skelter, informal exemptions that assessors grant taxpayers. The net effect is that the laws of Texas give little indication of the true size of the tax base. In practice, personal property is rarely included - - - except for automobiles, which some 400 districts tax.[152] Likewise, business personal property is exempted in many districts, and inventory is assessed only after it has been largely depleted.[153]

A vast class of personal property owners are never required to render their property, yet they are disenfran-

150. *Stone*, *supra* note 51 at 1020.

151. *Stewart*, *supra* note 128 at 1173, note 3.

152. Taxing districts within El Paso County do not require the rendition of automobiles.

153. Yudof, *supra* note 141 at 889.

chised. That members of this class may offer property to the assessor on their own initiative cannot excuse an obvious discrimination: the state makes it more difficult for one class of citizens to vote in bond elections than for another class. A landlord may be required to render his real property and perhaps his automobile, while a renter who owns no automobile receives no such demand. Even if the landlord refuses to render, and the assessor places the property on the tax rolls, the landlord is entitled to vote. In either case, the landlord is made a voter in bond elections not through his own volition, but by the demand of the assessor. The landlord is sought out by the tax assessor, but the renter is forced to seek out the tax assessor. Moreover, the landlord may be several years delinquent in the payment of his taxes, but his status as an elector is unchanged.

Citizens of requisite wealth, therefore, have their voting rights conferred upon them by the assessor even though all citizens are under a duty to render.

The renter, however, becomes a voter only if he takes affirmative steps to render his theretofore unsolicited personal property. In so doing, the renter places on the tax rolls property that the landlord was never required to render. For the privilege of voting in bond elections, the renter assumes a tax liability on particular items the assessor has sought of no other citizen.

The burden placed on owners of property unsought by the tax assessor is violative of the Equal Protection Clause. Such owners have been placed in a class which is required to perform an act demanded of no other class. The result of this act is to render for taxation property which otherwise would be untaxed. Even if it could be said that the Texas plan is concerned with legitimate voting

standards and qualifications,[154] the administration of the plan is discriminatory.[155] The method by which a citizen becomes eligible to vote in a bond election is not even-handed; an identifiable class is discriminated against because of economic status.

The restricted franchise has "no relation to standards designed to promote intelligent use of the ballot."[156] The restriction is imposed in order to achieve an end wholly unrelated to voting: the rendition of property for the collection of taxes. Texas has a variety of ways to enforce this ostensible policy without intruding on voting rights. The state should address itself directly to its articulated interests, rather than indirectly and imprecisely seeking to foster them.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted,

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154. *See, e.g.*, Lassiter v. Northampton Election Board, 360 U.S. 45 (1959).

155. *See, e.g.*, Louisiana v. United States, 380 U.S. 145 (1965).

156. *Harper, supra* note 6 at 666 *quoting Lassiter, supra* note 154 at 51.

CERTIFICATE OF SERVICE

I, Edward W. Dunbar, as counsel for the *amicus curiae* El Paso County Junior College District, and a member of the Bar of the Supreme Court, hereby certify that true and correct copies of the above foregoing Brief *Amicus Curiae* has been served upon the several parties, in compliance with Rule 33 of the Supreme Court Rules, by placing three copies in the mail, airmail postage prepaid, to S. G. Johndroe, Jr., City Attorney and Attorney for Appellees R. M. Stovall, S. G. Johndroe, Jr., Roy A. Bateman, Leonard E. Briscoe, Taylor Gandy, Jess M. Johnston, Jr., W. S. Kemble, Jr., John O'Neill, Ted C. Peters, Pat Reece, Mrs. Margaret Rimmer, and the City of Fort Worth, at 1000 Throckmorton Street, Fort Worth, Texas 76102; and that three copies were placed in the mail, airmail postage prepaid, to Don Gladden and Marvin Collins, attorneys for Appellees, at 702 Burk Burnett Building, Fort Worth, Texas 76102; and that three copies were placed in the mail, airmail postage prepaid, to John L. Hill, Attorney General of Texas and Larry F. York, Mike Willatt and G. Charles Kobdish, Assistant Attorney Generals, attorneys for Appellant, at Box 12548, Capitol Station, Austin, Texas 78711. All parties required to be served have been served.

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APPENDIX

TEX. CONST. art. VI, §3a

When an election is held by any county, or any number of counties, or any political sub-division of the State, or any political sub-division of a county, or any defined district now or hereafter to be described and defined within the State and which may or may not include towns, villages or municipal corporations, or any city, town or village, for the purpose of issuing bonds or otherwise lending credit, or expending money or assuming any debt, only qualified electors who own taxable property in the State, county, political sub-division, district, city, town or village where such election is held, and who have duly rendered the same for taxation, shall be qualified to vote and all electors shall vote in the election precinct of their residence.

TEX. CONST. art. VII, §3

One-fourth of the revenue derived from the State occupation taxes and poll tax of one dollar on every inhabitant of the State, between the ages of twenty-one and sixty years, shall be set apart annually for the benefit of the public free schools; and in addition thereto, there shall be levied and collected an annual ad valorem State tax of such an amount not to exceed thirty-five cents on the one hundred ($100.00) dollars valuation, as with the available school fund arising from all other sources, will be sufficient to maintain and support the public schools of this State for a period of not less than six months in each year, and it shall be the duty of the State Board of Education to set aside a sufficient amount out of the said tax to provide free text books for the use of children attending the public free schools of this State; provided, however, that

should the limit of taxation herein named be insufficient the deficit may be met by appropriation from the general funds of the State and the Legislature may also provide for the formation of school district by general laws; and all such school districts may embrace parts of two or more counties, and the Legislature shall be authorized to pass laws for the assessment and collection of taxes in all said districts and for the management and control of the public school or schools of such districts, whether such districts are composed of territory wholly within a county or in parts of two or more counties, and the Legislature may authorize an additional ad valorem tax to be levied and collected within all school districts heretofore formed or hereafter formed, for the further maintenance of public free schools, and for the erection and equipment of school buildings therein; provided that a majority of the qualified property taxpaying voters of the district voting at an election to be held for that purpose, shall vote such tax not to exceed in any one year one ($1.00) dollar on the one hundred dollars valuation of the property subject to taxation in such district, but the limitation upon the amount of school district tax herein authorized shall not apply to incorporated cities or towns constituting separate and independent school districts, nor to independent or common school districts created by general or special law.

TEX. ELECTION CODE ANN. art. 5.03 (Supp. 1974)

When an election is held by any county, or any number of counties, or any political subdivision of the state, or any political subdivision of a county or any defined district now or hereafter to be described and defined within the state, and which may or may not include towns, villages, or municipal corporations, or any city, town, or village, for the purpose of issuing bonds or otherwise lending credit, or

expending money or assuming any debt, only qualified electors who own taxable property in the state, county, political subdivision, district, city, town, or village where such election is held, and who have duly rendered the same for taxation, shall be qualified to vote and all electors shall vote in the election precinct of their residence. Property shall be deemed to have been duly rendered for taxation, for the purpose of determining eligibility to vote in an election as provided in this code and in Article VI, Section 3a, of the Texas Constitution, only if the property was rendered to the county, city, district, or other political subdivision holding the election within the period of time fixed by law for such rendition, or was placed on the tax rolls by the tax assessor prior to the date on which the election was ordered, if the regular rendition period expired before that date.

TEX. ELECTION CODE ANN. art. 5.04(a)

(a) Before any person is allowed to vote in an election for the purpose of issuing bonds or otherwise lending credit, or expending money or assuming any debt, he shall sign and swear to an affidavit to the effect that he owns property, giving a description of one item, which has been duly rendered for taxation to the political subdivision holding the election at a time and in a manner which entitles him to vote in the election, as provided in Section 35 (Article 5.03) of this code. The voter's registration certificate number shall be shown on the affidavit, and it shall contain a statement that the affiant understands that the giving of false information in the affidavit is a felony punishable by a fine not to exceed $5,000 or by imprisonment in the penitentiary not to exceed five years, or by both such fine and imprisonment.

Supreme Court, U.S.
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No. 73-1723

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

JOHN L. HILL, ATTORNEY GENERAL OF TEXAS,
Appellant,

v.

MICHAEL L. STONE, ET AL,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF AMICUS CURIAE OF BEHALF OF THE CITY OF CORPUS CHRISTI, TEXAS

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No. 73-1723

In The

Supreme Court of the United States

October Term, 1974

John L. Hill, Attorney General of Texas,
Appellant,

v.

Michael L. Stone, Et Al,
Appellees.

On Appeal From The United States District Court For The Northern District of Texas

---

BRIEF AMICUS CURIAE OF BEHALF OF THE CITY OF CORPUS CHRISTI, TEXAS

To The Honorable United States Supreme Court:

QUESTION PRESENTED

The following question is presented by this appeal:

> Are Texas election laws limiting the franchise in general obligation tax bond elections to persons who own taxable property which has been rendered for taxation consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

INTEREST OF AMICUS CURIAE

The City of Corpus Christi is the primary defendant in a cause numbered 74-C-60 styled William O. Harrison, Jr., et al. v. The City of Corpus Christi, et al, presently pending before the United States District Court for the Southern District of Texas, Corpus Christi Division. Such cause is, in all respects, similar to the case at bar. The City of Corpus Christi filed a Motion to Intervene in the case at bar before the three-Judge District Court. Said Motion was denied.

In the cause pending in the United States District Court for the Southern District of Texas, Corpus Christi Division, the City Council submitted nine separate bond propositions for voter approval on December 9, 1972. The election was conducted as two separate but simultaneous elections as was the Fort Worth election in the case at bar and as instructed by the Attorney General of Texas. All propositions passed property owners, non-property renderers, and total vote with the exception of Proposition Two (the Convention Center Proposition) which vote was as follows:

OWNERS OF PROPERTY RENDERED FOR TAXATION	
FOR	7,705
AGAINST	7,810
NON-RENDERERS	
FOR	1,601
AGAINST	820
TOTAL FOR	9,306
TOTAL AGAINST	8,630

The result is that the Convention Center Bonds will be approved for sale only if the non-rendering voters were

constitutionally entitled to vote and have their vote counted equally with rendering property owners despite Texas and Corpus Christi laws to the contrary.

This brief is filed for the City of Corpus Christi, Texas, a municipal corporation, home-rule city, and political subdivision of the State of Texas, sponsored by its authorized law officer, the City Attorney, as provided in Supreme Court Rule 42 (4).

ARGUMENT

A. The Texas Laws in Question Violate the United States Constitution's Equal Protection Clause

This Court has held as invalid state laws which selectively granted the right to vote on grounds that they denied equal protection under the Fourteenth Amendment. *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969); *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969); *City of Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970); *Stewart* v. *Parish School Board of St. Charles Parish*, 310 F. Supp. 1172 (1970) aff'd mem., 400 U.S. 844 (1970).

In *Kramer*, this Court struck down a New York statute which granted the right to vote in a local school board election only to those who owned or leased taxable real property in the district or were parents or custodians of children enrolled in the public schools.

The *Cipriano* decision invalidated a Louisiana statute which permitted only property owners to vote on the question of approving bonds that were to be financed exclusively from the revenues of a municipal public utility. In *Phoenix*, this Court held that an Arizona constitutional limitation of the franchise in general obligation bond elections to persons who were qualified electors and also real

property taxpayers was in violation of the Equal Protection Clause. In *Stewart*, the three-judge District Court abrogated Louisiana statutes which restricted eligibility to vote in tax bond elections to property taxpayers and also weighted each elector's vote by the monetary value of his assessed property. *Stewart* (supra) was affirmed by this Court.

In *Cipriano, Phoenix,* and *Stewart,* the arguments were made that there was a compelling state interest in limiting the franchise to those that were primarily interested, i.e., taxpayers, or that there was a rational basis for the limitation, i.e., limiting the decision to those whose property would be taxed to retire the indebtedness. The premise of the argument is that persons who are not property taxpayers would be irresponsible or extravagant in incurring or approving indebtedness for others to pay. In each of the three cases, however, the bonds were approved by those limited holders of the franchise and in each the Court found an Equal Protection violation and enjoined the bond sales.

It would seem that the requirement of unlimited franchise is absolute when viewed in light of the facts in *Cipriano, Phoenix,* and *Stewart*. Certainly the fear of irresponsible or uninformed approval was not present. To try to maintain the "primarily interested" requirement in light of *Phoenix* becomes a non sequitur. Since the Court has invalidated elections where those "primarily interested" voted approval, must it logically be concluded that bond elections approved by all voters conform to the requirements of the Equal Protection Clause?

In fact, the Attorney General of Texas' approval of bonds for sale under the dual-box policy is limited to situations where the bonds ". . . have been approved not only

by the owners of taxable property duly rendered, voting in a separate box, but also by the aggregate of all electors." (Appellants Brief p. 10.) Those who have not been fully enfranchised by the action of the Tax Assessor-Collector or their own action in rendering property, apparently have a negative vote franchise but not an affirmative vote franchise. Is there a rational basis for giving those not "primarily interested" the power to veto public projects and denying them a vote in favor of public projects? This possibility would seem to encourage those who wish to escape their share of the tax burden to fail to render their property and retain the authority to prevent public expenditures. As pointed out aptly in Appellees Brief the rationale of encouraging rendition is not supported by noticeable increases in personal property renditions nor by rendering a pencil as assumption of a fair share of the tax burden.

B. The Decision of the District Court Should Apply in All Texas Cases Arising After June 23, 1970 in Which the Dual-Box Election Procedure Was Followed and Where the Bonds Have Not Been Sold.

In many cases this Court has applied *new rules* prospectively. (emphasis added.) The real question if the Court affirms the District Court is whether or not in light of *Cipriano* and *Phoenix* this is a new rule.

Texas was one of fourteen states restricting the franchise at the time of the *Phoenix* decision, June 23, 1970.

> Nor have we been shown that the fourteen states now restricting the franchise have unique problems that make it necessary to limit the vote to property owners. *Phoenix* v. *Kolodziejski*, 399 U.S. 204-213 (1970)

The Attorney General of Texas instituted the dual-box election procedure and began validation of bonds approved

by owners of taxable property duly rendered, voting in a separate box, and also by the aggregate of all electors. There is not presented in this case the problem of retroactivity disrupting previously issued bonds. That valid contractual concern was properly dealt with in *Cipriano* and *Phoenix*.

The situation posed if the Court affirms the District Court is whether the decision should apply retroactively to June 23, 1970, on those cases where the bonds were approved by the aggregate of all electors but not by the owners of taxable property duly rendered, whether the decision should apply in the case at bar and other pending litigation to require the sale of bonds; or whether the decision should only apply prospectively and in the case at bar as announced by the District Court.

This Court after a lengthy discussion of retroactivity and noting that at common law there was no authority for the proposition that judicial decisions made law only for the future has stated

> Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. . . .
>
> *Linkletter* v. *Walker* 381 U.S. 618, 629 (1965)

It is submitted that the merits of this issue before the Court weigh in favor of an application of the decision retrospectively at least to the extent of challenges pending or available at the time of this Court's decision. This result would further the purpose of the standards announced by this Court.

CONCLUSION

For the reasons stated the decision of the three-judge District Court that the Texas laws in question violate the U. S. Constitution's Equal Protection Clause should be affirmed; however, the judgment of that Court should be modified to make it applicable to the Corpus Christi case and like cases pending in which the dual-box election procedure was followed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James F. McKibben, Jr., as of counsel for Amicus Curiae herein named and member of the Bar of the Supreme Court, hereby certify that true and correct copies of the above foregoing Amicus Curiae Brief have been served upon the several parties thereto, in compliance with Rule 33(1) of the United States Supreme Court Rules, by placing three copies in the mail, first class postage prepaid, to S. G. Johndroe, Jr., City Attorney and Attorney for Appellees R. M. Stovall, S. G. Johndroe, Jr., Roy A. Bateman, Leonard E. Briscoe, Taylor Gandy, Jess M. Johnston, Jr., W. S. Kemble, Jr., John O'Neill, Ted C. Peters, Pat Reece, Mrs. Margaret Rimmer, and the City of Fort Worth, at 1000 Throckmorton Street, Fort Worth, Texas 76102; and by placing three copies in the mail, first class postage prepaid, to Don Gladden and Marvin Collins, Attorneys for Appellees, at 702 Burk Burnett Building, Fort Worth, Texas 76102; and by placing three copies in the mail, first class postage prepaid to John L. Hill, Attorney General of Texas, Larry F. York, First Assistant Attorney General, Mike Willatt, Assistant Attorney General, and G. Charles Kobdish, Assistant Attorney General, Attorneys for Appellant, State of Texas, at Box 12548, Capitol Station, Austin, Texas 78711. I further certify that I also placed three copies in the mail, first class postage prepaid to Marshall Boykin III at 2000 Bank & Trust Tower, B & T 249, Corpus Christi, Texas 78477. All parties required to be served have been served.

Witness my hand this 27 day of December, 1974.

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No. 73-1723

Supreme Court, U. S.
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For The Northern District Of Texas

BRIEF OF CITY OF PHOENIX, ARIZONA, AND CERTAIN BOND COUNSEL, AMICI CURIAE, RELATING TO BOND ELECTIONS HELD AND TO BE HELD IN STATES AFFECTED BY THE DECISIONS OF THIS COURT IN CIPRIANO V. CITY OF HOUMA AND CITY OF PHOENIX V. KOLODZIEJSKI

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No. 73-1723

JOHN L. HILL, Attorney General of Texas,
Appellant,

vs.

MICHAEL L. STONE, et al,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF OF CITY OF PHOENIX, ARIZONA, AND CERTAIN BOND COUNSEL, AMICI CURIAE, RELATING TO BOND ELECTIONS HELD AND TO BE HELD IN STATES AFFECTED BY THE DECISIONS OF THIS COURT IN CIPRIANO V. CITY OF HOUMA AND CITY OF PHOENIX V. KOLODZIEJSKI

INTEREST OF AMICI CURIAE

Amici Curiae comprise (i) the City of Phoenix, Maricopa County, Arizona, a political subdivision of said state, and (ii) certain lawyers and laws firms specializing as "bond

counsel" in the drafting of state laws, the preparation of proceedings, and the rendition of approving opinions relating to state and local government bonds and other instruments of obligation.

Without arguing for a decision on the merits of the case, Amici Curiae urge, if the Court decides to reverse the decision of the court below and to declare that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution permits a state to require a two-ballot election for the issuance of bonds of its political subdivisions (one set of ballots being voted by taxpayers only and the other by all qualified electors), that the Court make such decision prospective only so as not to cast doubt on bonds heretofore issued and bond elections heretofore held in states other than Texas.

The undersigned City of Phoenix, having been enjoined from issuing $173,000,000 bonds (including both revenue bonds and general obligation bonds) voted by real property taxpayers at an election held in said city on June 10, 1969, by decision of the Federal District Court for the District of Arizona, which was affirmed by the Supreme Court of the United States in *City of Phoenix* v. *Kolodziejski*, 399 U.S. 204, 23 L.Ed. 2d 523, 90 S.Ct. 1990, has subsequently held elections for the issuance of $177,400,000 various issues of general obligation bonds and revenue bonds on August 16, 1970 and $56,500,000 general obligation bonds on May 8, 1973. Some, but not all of the bonds voted in 1970 and 1973, have been issued and purchased in good faith by members of the investing public. Both of said elections of 1970 and 1973 were open to all qualified electors regardless of whether they paid a real property tax or not despite the

express language of Article 7, Section 13 of the Arizona Constitution, which purports to limit to real property taxpayers the right to vote in bond elections. Each of the undersigned bond counsel regularly approves bonds issued by political subdivisions in one or more of the states whose laws are discussed below. By long established custom and practice, approving opinions of bond counsel regarding the validity and enforceability of bonds are required in the public market to assure acceptance of such bonds by underwriters and investors. Because of their special experience and knowledge in state and local government financing, the undersigned bond counsel present their views to this court as amici curiae on an aspect of the instant case which is within their special competence. This brief is filed under Rule 42(4) of the Revised Rules of the Supreme Court.

ARGUMENT

It is not the purpose of this brief to take a position upon the merits of the controversy but rather to acquaint the court with the practices being followed by states other than Texas in response to the decisions of this Court in *Cipriano* v. *City of Houma,* 395 U.S. 701, 23 L.Ed. 2d 647, 89 S.Ct. 1897, and *City of Phoenix* v. *Kolodziejski,* 399 U.S. 204, 23 L.Ed. 2d 523, 90 S.Ct. 1990 (June 23, 1970), and with the possibility that a reversal of the court below, absent proper precautionary language, might cast serious doubt upon the validity of billions of dollars worth of outstanding bonds of political subdivisions (including Phoenix) voted and issued by political subdivisions and purchased by investors in good faith reliance upon local interpretations of the *Cipriano* and *Phoenix* decisions, and might make it impossible for Phoenix to sell the heretofore unsold portions of the bonds voted by its residents in 1970 and 1973.

At the time of the *Cipriano* decision, (holding that a state cannot constitutionally restrict to taxpayers the right to vote in revenue bond elections) and at the time of the *Phoenix* decision (holding that a state cannot restrict to taxpayers the right to vote in general obligation bond elections), fourteen states had constitutional or statutory requirements that did so restrict such voting in some or all bond elections. In addition, Wyoming and Nevada had "two-ballot" voting procedures under which a bond issue, to be successfully voted, must carry both by vote of the qualified non-taxpaying voters and by vote of the voters who were taxpayers. Wyoming Statutes Sections 22-130 *et seq.,* Nevada Revised Statutes Sections 350.050 and 350.070. The word "taxpayers" is used herein generically although in some states the favored group were property owners or people required to render property for taxation regardless of whether taxes were paid.

In all of those sixteen states, other than Texas, bond elections are now open to all qualified voters, with no special additional election for taxpayers, except as permitted by this Court in the case of certain districts whose existence is purely for the improvement of land. *Salyer Land Co.* v. *Tulare Lake Basin Water Storage District,* 410 U.S. 719, 35 L.Ed. 2d 659, 93 S.Ct. 1224; *Associated Enterprises Inc.* v. *Toltec Watershed Improvement District,* 410 U.S. 743, 35 L.Ed. 2d 675, 93 S.Ct. 1237. In some of these states the change in procedure has been established by virtue of state supreme court decisions alone, in others by legislative acts, sometimes coupled with state supreme court decisions, in others by virtue of the adoption of new constitutions and in yet others by the determination of the issuer, upon advice of counsel, that the rule of the *Cipriano* and *Phoenix* decisions was so clear that no further authority was needed to let all qualified voters vote regardless of their status as taxpayers. In most instances the changes in procedure were accomplished in the face of state constitutional or statutory law which would have been violated if valid. If, by reversing the court below, this Court should establish a precedent to the effect that a two-ballot election satisfies the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, such decision might amount to overruling the determinations by the various state supreme courts and local bond counsel; this Court has held that a state courts' interpretation of state law under compulsion of overriding federal law erroneously

understood is not binding precedent. *Tipton* v. *Atchison, Topeka & Santa Fe Railway Co.*, 298 U.S. 141, 80 L.Ed. 1091, 56 S.Ct. 715, 104 A.L.R. 831; *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109, 68 L.Ed. 582, 44 S.Ct. 274; 36 C.J.S. 401, Federal Courts §171. Upon such an overruling the court of last resort in each state wherein the taxpayer requirement is still on the books might feel constrained to hold that its state constitution or statute retains enough effect under *Cipriano* and *Phoenix* to require a taxpayers' election if a "free for all" election is also held on the same question. See the decision of the Supreme Court of Wyoming in *State ex rel Voiles* v. *Johnson County High School*, 43 Wyoming 494, 5 P.2d 255, holding that although state constitutional provisions requiring all elections to be open, free and equal and also requiring a vote by the people to approve bonds meant an election at which all qualified electors could vote, there was no objection to the legislature's adding an additional restriction on the issuance of municipal bonds. Such restriction was that the ballots of taxpayers and non-taxpayers be counted separately and that a majority of each class must favor the bonds before they could be issued. A similar result was reached by the Nevada Supreme Court in *Hard* v. *Depaoli*, 56 Nev. 19, 41 P.2d 1054.

If the Supreme Court of a state should conclude that a two-ballot election is required to comply with both state law and the Equal Protection Clause, it would be difficult for that court to conclude that bonds voted only in a "free for all" election were legally voted. As the amount of bonds voted and issued in such states since the *Phoenix* decision has aggregated billions of dollars, and most of those bonds are still outstanding, amici curiae consider it important that no doubt of their validity be raised as an unintended result of the decision of this Court in the instant case.

For this reason, the undersigned bond counsel amici curiae, each of whom has approved a substantial amount of bonds voted and issued in accordance with local interpretations of the *Cipriano* and *Phoenix* decisions that only an election at which all qualified electors may vote is constitutional, respectfully request that the Court consider making prospective only, as to states other than Texas, any determination that a two-ballot election satisfies the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The undersigned City of Phoenix respectfully requests that the Court consider making such prospective application to apply only to elections hereafter called and held, so that it may proceed to issue the bonds heretofore voted in 1971 and 1973 without the necessity of calling another election, as well as making said determination prospective as to bonds heretofore issued. A basis for such determination of prospectivity can be found in both the *Cipriano* and *Phoenix* cases wherein this court held that bonds previously voted by taxpayers only under laws theretofore in effect would not be affected by the decisions in those cases. Of course, if this Court should determine to affirm the decision of the court below, no such prospective feature need be included in the courts' determination, insofar as bonds of political subdivisions in states other than Texas are concerned.

To establish the reactions of the various states other than Texas to the decisions of this Court in the *Cipriano* and *Phoenix* cases, the following paragraphs show, state by state, the practice followed by each of the states which previously had taxpayer requirements to vote in bond elections, together with citations to pertinent sources of state law:

ALASKA

At the time of the *Phoenix* decision, Alaska Statutes Section 07.30.010(d) (Supp. (1969)) provided that a home rule city's charter could restrict to taxpayers the right to vote in bond elections. The law governing such elections has been revised and moved to another portion of the Statutes by Section 2 of Chapter 118 S.L.A. 1972; the resulting Section 29.28.030, governing the qualifications for voters in municipal elections, does not permit any municipality to restrict the right to vote in bond elections to taxpayers.

ARIZONA

School District No. 26 (Bouse Elementary) of Yuma County v. *Strohm*, 106 Arizona 7, 469 P.2d 826, involved an issue of bonds of a school district which were approved by vote of both taxpayers and qualified electors generally at a two-ballot election held on August 5, 1969, less than two months following the decision of the United States Supreme Court in the *Cipriano* case. The trial court denied a petition for a writ of mandamus to compel the Board of Supervisors of the County to issue the bonds as requested by the School District on the grounds (1) that the taxpayers' election violated the Fourteenth Amendment to the United States Constitution and (2) there was no authority under Arizona law authorizing a free-for-all election on school bonds. Pending the appeal of that case the Arizona Legislature adopted Chapter 55, Laws of Arizona, 1970 as emergency legislation which took effect April 21, 1970. This law authorized, among other things, a School District to hold simultaneous elections for bond issues, submitting such issues to taxpayers and to all qualified voters respectively. The law also provided that elections held after the date of the *Cipriano* decision which would have been valid under the

Cipriano decision shall be deemed valid for the purpose of authorizing such bonds. The Arizona Supreme Court on May 27, 1970 (before the June 23, 1970 decision of this Court in the *Phoenix* case) thereupon reversed the decision of the trial court holding: "If the election at which only real property taxpayers were permitted to vote does not violate the Fourteenth Amendment to the Federal Constitution, then the election is legal and valid, but if the election is void as unconstitutional under the Fourteenth Amendment, then the election at which all qualified electors of the school district voted is a legal election, having been retrospectively validated and ratified by the Arizona Legislature. . . . One or the other of the elections is valid, and it is immaterial which, for a lawful proceeding antedates the issuance of the bonds."

Subsequently, on June 23, 1970 the United States Supreme Court decided the *Phoenix* case holding unconstitutional the bond election of June 10, 1969 mentioned above. Since the decision of the United States Supreme Court in the *Phoenix* case, both general obligation bonds and revenue bonds have been issued pursuant to elections at which all qualified electors have been permitted to vote with no separate taxpayers' election. Pursuant to Chapter 37, Laws of Arizona, 1971, the Arizona Legislature amended various laws governing the holding of bond elections to change the designation of who may vote from "qualified real property taxpayers" to "qualified electors." The pertinent section of the Arizona Constitution (Article VII, Section 13) still contains the phrase "vote of the real property taxpayers, who shall also in all respects be qualified electors. . ." Chapter 37, Laws of Arizona, 1971, also repealed those portions of Chapter 55, Laws of Arizona, 1970, which permitted two-ballot elections on bonds of school districts and counties and municipalities.

Thus, there is now no authority under which a two-ballot bond election can be held in Arizona to determine the issuance of bonds of such political subdivisions. The 1974 Session of the Arizona Legislature, by S.C.R. 1003, First Special Session, proposed an amendment to Article VII, Section 13 of the Arizona Constitution which would have prescribed a minimum number of electors who must vote at bond elections and would have eliminated the language appearing in that section which, before the *Phoenix* case, restricted to real property taxpayers the right to vote in bond elections. Said amendment failed of ratification at the November 5, 1974 general election.

COLORADO

Article XI, Section 6 of the State Constitution dealing with counties, Section 7 dealing with school districts, and Section 8 dealing with cities and towns prohibited the incurring of debt by loan without favorable vote at a taxpayers' election, with some exceptions. By amendment ratified November 3, 1970, effective January 1, 1972, Section 6 of said Article governed all political subdivisions of the state except home rule cities and towns and prohibited debt "unless the question of incurring the same be submitted to and approved by a majority of the qualified taxpaying electors voting thereon, as the term 'qualified taxpaying elector' shall be defined by statute." On August 31, 1970 the Colorado Supreme Court held that the *Phoenix* case eliminated the taxpayer requirement from a statute prescribing the requirement for voting on a proposition to increase taxes in *Pike* v. *School District No. 11 in El Paso County, Colorado,* 474 P.2d 162. Subsequently all qualified electors who comply with pertinent registration laws have been permitted to vote at such bond elections without distinction between taxpayers and others.

FLORIDA

The Florida Constitution, Article VII, Section 12, provides that counties, school districts, municipalities, special districts and local governmental bodies with taxing powers may issue bonds payable from ad valorem taxes (other than refunding bonds) "only when approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation." On March 24, 1971 in *State* v. *City of Miami Beach,* 245 S.2d 863, the Florida Supreme Court affirmed a trial court judgment declaring valid two bond issues of the City of Miami Beach which were voted at two-ballot elections, even though there was no authority at the time for submitting such an election to a vote of all qualified electors and even despite the unfavorable freeholders' vote on one of the propositions at the election, which was held prior to the decision of the United States Supreme Court in the *Phoenix* case. "The question is settled by *Phoenix* and related U.S. Supreme Court cases and we are accordingly mandated to approve the vote by all qualified electors and the ensuing City Resolutions thereon." *State* v. *City of Miami,* 260 S.2d 497 (Florida Supreme Court, March 29, 1972) affirmed a lower court judgment declaring valid certain bonds which were voted at a special bond election held June 30, 1970 whereat the propositions to issue the bonds were submitted at one election to freeholders only and at an additional election to all qualified electors pursuant to Chapter 70-18, Laws of Florida, approved May 12, 1970. The statute provided that a city would have power to issue the bonds "if the issuance of such bonds shall have been approved by vote in a bond election of a majority of the qualified electors of, together with a majority of the qualified freeholder electors of, such governmental taxing unit voting thereon." In the freeholder election both bond

propositions failed, but overall they carried. The court declared: "It is clear that under the *Phoenix* decision, *supra*, general obligation bond elections can no longer be limited to freeholders. Florida Statutes, Chapter 70-18, permitting a majority of the freeholders voting to veto a majority vote of all electors, in effect permit issuance of ad valorem bonds only when approved by freeholder vote and is unconstitutional." This interpretation of the effect of the *Phoenix* case on a Florida constitutional provision requiring that only freeholders vote in an election to increase ad valorem taxes was recognized by the United States Court of Appeals, Fifth Circuit, in *Tornillo* v. *Dade County School Board*, 458 Fed. 2d 194 (March 31, 1972).

IDAHO

Idaho Code Sections 31-1905 and 31-3502 governing county bond elections, 33-404 governing school district bond elections, Sections 39-1339 and 39-1342 governing hospital district bond elections, Section 42-3222 governing water and sewer district bond elections, Section 50-1026 governing city bond elections and Section 70-1716 governing port district bond elections all contained property taxpayer requirements until removed by Chapter 25, Laws of Idaho, 1971, approved and effective February 16, 1971. On January 25, 1971 the Supreme Court of Idaho in *Muench* v. *Paine*, 94 Idaho 12, 480 P.2d 196, held that its previous decision on January 16, 1970 in the same case upholding the taxpayer qualification to vote in bond elections (*Muench* v. *Paine*, 93 Idaho 473, 463 P.2d 939) would not be amended nor the judgment recalled in view of the prospective effect of the *Phoenix* decision five months later, but nevertheless stated that "general obligation bonding election statutes of this state which limit the franchise to real property owners must be considered as invalid under the pronouncement of the United States Supreme Court in *Phoenix* v. *Kolodziejski, supra.*" Subsequently all qualified electors who comply with pertinent registration laws have been permitted to vote at such bond elections without distinction between taxpayers and others.

LOUISIANA

The Louisiana Constitution of 1921, Article XIV, Section 14(a) permitted general obligation bonds of political subdivisions to be issued only "when authorized by vote of a majority in number and amount of the property taxpayers qualified to vote. . ." This provision has been superseded by Article VI, Part II, Section 33 of the Constitution of the State of Louisiana of 1974, effective January 1, 1975, declaring that such bonds may be issued "only after authorization by a majority of the electors voting on the proposition. . ." In 1970 the Louisiana Legislature adopted Act Number 277, effective July 13 of that year, declaring that if the provisions of the Louisiana Constitution or laws which limit to taxpayers the right to vote are held void by the U.S. Supreme Court, then all qualified electors may vote in bond elections. On February 25, 1970, a three-judge federal district court in New Orleans held that the taxpayer requirement of the Louisiana Constitution was void and that the general election laws should cover bond elections and all qualified electors should be permitted to vote regardless of the amount of their property. *Stewart* v. *Parish School Board of St. Charles Parish*, 310 F. Supp. 1172. This decision was affirmed by the United States Supreme Court on November 9, 1970, citing *Phoenix*, at 400 U.S. 884, 27 L.Ed. 2d 129, 91 S.Ct. 136. Subsequently all qualified electors who comply with pertinent registration laws have been permitted to vote at such bond elections without dis-

tinction between taxpayers and others. In *Hebert* v. *Police Jury of Vermilion Parish*, 258 La. 41, 245 S.2d 349, the Louisiana Supreme Court held that the *Phoenix* case did not apply to an election on bonds of a road district on the grounds that the road district was established primarily for the benefit of nearby land. Citing the *Cipriano*, *Phoenix* and *Stewart* cases, the United States Supreme Court reversed such decision on October 12, 1971 in *Police Jury of Parish of Vermilion* v. *Hebert*, 404 U.S. 807, 30 L. Ed. 2d 39, 92 S. Ct. 52.

MICHIGAN

Michigan Constitution of 1963, Article II, Section 6, provides that "only electors i: and who have property assessed for any ad valorem taxes in" the district or territory affected, or their husbands or wives, may vote in bond elections. This provision has not been amended nor has the Michigan Supreme Court decided any case interpreting the effect of the *Cipriano* and *Phoenix* cases thereon. Bonds are generally voted by all qualified electors in Michigan political subdivisions on the theory that the *Cipriano* and *Phoenix* cases, as well as the decisions of courts in other states, clearly have the effect of excising the property taxpayer requirement.

MONTANA

The Montana Constitution of 1889, Article IX, Section 2 provided that if a question submitted at an election concerned the creation of any debt or liability a person, to vote, "must also be a taxpayer whose name appears on the last preceding completed assessment roll. . ." In *State ex rel Ward* v. *Anderson*, 158 Mont. 279, 491 P.2d 868, decided November 23, 1971, the Montana Supreme Court recognized that the *Phoenix* and *Cipriano* cases had the

effect of excising the taxpayer requirement. "These decisions make it clear that that portion of Article IX, Section 2, of the Montana Constitution, quoted above, is invalid. The Montana Legislature recognized this by enacting Chapter 234, Laws of 1971, which allows all qualified electors to vote on local bond issues, and by voting to submit a proposed amendment to Article IX, Section 2, which will, if approved by the voters, delete the invalid requirement. Chapter 159, Laws of 1971." Subsequently all qualified electors who comply with pertinent registration laws have been permitted to vote at such bond elections without distinction between taxpayers and others. The amendment proposed by Chapter 159 of the Laws of 1971 was rejected at the general election in November, 1972, after the people of Montana ratified a new Constitution on June 6, 1972, effective July 1, 1973, which contains no provision limiting the right to vote in bond elections to taxpayers.

NEVADA

Nevada Revised Statutes Sections 350.050 and 350.070, at the time of the *Phoenix* case, provided for a two-ballot election; one set of ballots, printed on colored paper, were supplied to the qualified voters who were owners or spouses of owners of real property and the other set, printed on white paper, were supplied to all other qualified electors. The election was required to carry on each set of ballots before the bonds could be issued. The law was amended pursuant to Chapter 49, Statutes of Nevada, 1971, pages 91 *et seq.*, to eliminate all requirements for separate ballots and ballot boxes. Subsequently all qualified electors who comply with pertinent registration laws have been permitted to vote at such bond elections without distinction between taxpayers and others.

NEW MEXICO

New Mexico Constitution, Article IX, Section 10, restricts voters in county bond elections to those "who paid a property tax therein during the preceding year;" Section 11 of the same Article restricts the right to vote in school bond elections to "owners of real estate within the school district" and Section 12 of the same Article restricts the right to vote on city, town or village bonds to those who "have paid a property tax therein during the preceding year." These provisions have not been amended; on December 7, 1970 the Supreme Court of New Mexico in *Board of Education of the Village of Cimarron* v. *Maloney*, 82 N.M. 167, 477 P.2d 605, held that the effect of the *Phoenix* case was to excise the property ownership requirement from Section 11 and bonds have generally been issued since then under Sections 10 and 12 as well pursuant to vote of all qualified electors.

NEW YORK

The New York Town Law, Section 84, prohibits anyone from voting upon a proposition for the spending of money or the incurring of any town liability unless he or she is an owner of property "assessed upon the last preceding town assessment roll." A similar provision previously appeared in Section 4-402 of the Village Law but has been omitted by the recodification of the Village Law pursuant to Laws, 1972, Chapters 887 to 895, inclusive. On August 28, 1972 *In re Cohalan*, 1972, 71 Misc. 2d 196, 335 N.Y.S. 2d 747, affirmed 41 A.D. 2d 840, 342 N.Y.S. 2d 153, held that the Town Law restriction was unconstitutional in a proceeding to declare invalid a petition for a referendum on a proposed acquisition of real estate by the Town of Islip. Enough of the signers of the petition were non-property owners so that without their signatures the petition would be insufficient, but, citing

Kramer v. *Union Free School District*, 395 U.S. 621, 23 L.Ed. 2d 583, 89 S.Ct. 1886, as well as *Phoenix* and *Cipriano*, the court held that their signatures were valid under Section 91 of the Town Law. Section 91 provides that only those qualified to vote on a proposition to spend money may sign such a petition. Subsequently all qualified electors who comply with pertinent registration laws have been permitted to vote at such elections without distinction between taxpayers and others. This practice has been upheld in *Wright* v. *Town Board of Town of Carlton*, 70 Misc. 2d 1, 332 N.Y.S. 2d 233 affirmed as modified on other grounds 41 A.D. 2d 290, 342 N.Y.S. 2d 577, affirmed 33 N.Y.2d 977, 309 N.E.2d 137 regarding an election on the creation of a water district and in *Light* v. *MacKenzie*, 78 Misc. 2d 315, 356 N.Y.S. 2d 99 respecting a fire district bond issue.

OKLAHOMA

Oklahoma Constitution, Article X, Section 27, provides that a city or town may "by a majority of the qualified property taxpaying voters of such city or town, voting at an election to be held for that purpose," become indebted in excess of the debt limit prescribed by Section 26 of that Article which requires a 3/5ths majority at an election by all qualified voters. This taxpayer qualification was upheld by the Supreme Court of Oklahoma in *Settle* v. *City of Muskogee*, 462 P.2d 642 on December 31, 1969, following the *Cipriano* case; on March 30, 1971 the Oklahoma Supreme Court decided *City of Spencer* v. *Rayburn*, 483 P.2d 735, holding that the effect of the *Phoenix* case was to excise the taxpayer requirement from Section 27. Subsequently all qualified electors who comply with pertinent registration laws have been permitted to vote at such bond elections without distinction between taxpayers and others.

RHODE ISLAND

The Rhode Island Constitution, Amendment Number 29, Section 2, provided that no one might vote upon any proposition to impose a tax for the expenditure of money in a town unless he shall "either (1) be really and truly possessed in his own right of real estate in such town of the value of one hundred thirty-four dollars over and above all encumbrances . . . or (2) shall within the year next preceding have paid a tax assessed upon his personal property in said town of the value of at least one hundred thirty-four dollars." This provision was anulled and superseded by Amendment Number 37 adopted by the people November 6, 1973.

UTAH

Utah Constitution, Article XIV, Section 3, prohibits the incurring of any debt by any county, school district or city "unless the proposition to create such debt shall have been submitted to a vote of such qualified electors as shall have paid a property tax therein in the year preceding such election. . ." In *Cypert* v. *Washington County School District,* 24 Utah 2d 419, 473 P.2d 887, on July 16, 1970 the Utah Supreme Court held that the effect of the *Phoenix* case was to excise the taxpayer requirement from the constitutional election requirement. Subsequently all qualified electors who comply with pertinent registration laws have been permitted to vote at such bond elections without distinction between taxpayers and others.

WYOMING

Wyoming Statutes, Sections 22-130 *et seq.,* at the time of the *Phoenix* case provided that non-property owners receive white ballots and deposit them in a ballot box designated Box "A" and that property owners and their spouses get colored ballots and deposit them in ballot Box "B". The election was required to carry in each ballot box

before the bonds could be issued. Chapter 240, Session Laws of Wyoming, 1971, revised the laws for bond elections generally and required one set of ballots for all qualified electors, printed on white paper, and one ballot box at each polling place. Subsequently all qualified electors who comply with pertinent registration laws have been permitted to vote at such bond elections without distinction between taxpayers and others. This change has been carried forward in a new election code for the State of Wyoming by Chapter 251, Session Laws of Wyoming, 1973.

SUMMARY OF ARGUMENT

In all of the states which, at the time of the *Phoenix* case, restricted to taxpayers the right to vote in bond elections, other than Texas, bonds have been voted and issued in reliance upon local interpretations that *Phoenix* prohibited the states from granting to taxpayers alone a right at an election to reject a bond issue proposed by the local governing body. A reversal of the decision of the court below, if this Court declares that such a right may be granted to taxpayers as a class when coupled with an election at which all qualified electors may vote, might mean that such local interpretations were erroneous and that under state constitutions and laws (prior to amendment or revision in some states) bonds issued after having been voted only at elections open to all qualified electors were issued in violation of those constitutions and laws which could, consistently with the Equal Protection Clause, have been obeyed by the use of a two-ballot election.

CONCLUSION

Any reversal of the court below on the merits should be prospective only as to states other than Texas so that the rule enunciated by such reversal will apply only to bond elections called and held after the date of this Court's decision.

Respectfully submitted,

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CERTIFICATE

I, the undersigned bond counsel amicus curiae do hereby certify that the foregoing brief has been served on counsel for all parties in this matter by depositing a copy thereof in the United States mail, air mail postage prepaid, addressed to each of them at his respective address this 10th day of January, 1975.

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MANLY W. MUMFORD